66

# CASES DETERMINED

BY THE

## ST. LOUIS AND THE KANSAS CITY

# COURTS OF APPEALS

OF THE

# STATE OF MISSOURI,

FEBRUARY 1, 1904, TO FEBRUARY 15, 1904.

June 14

REPORTED FOR
ST. LOUIS COURT OF APPEALS
BY JOHN TURNER WHITE, of the Springfield Bar,
AND FOR THE
KANSAS CITY COURT OF APPEALS
BY BEN ELI GUTHRIE, of the Macon City Bar,
OFFICIAL REPORTERS.

## VOL. 105.

COLUMBIA, MO.
E. W. STEPHENS, PUBLISHER,
1904.

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Rec. Jan. 23, 1905.

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# JUDGES OF THE ST. LOUIS COURT OF APPEALS.

HON. CHARLES C. BLAND, *Presiding Judge.*

HON. VALLE REYBURN, }
HON. RICHARD L. GOODE, } *Judges.*

JOHN H. MURPHY, *Clerk.*

JOHN TURNER WHITE, *Reporter.*

# JUDGES OF THE KANSAS CITY COURT OF APPEALS.

HON. JACKSON L. SMITH, *Presiding Judge.*

HON. JAMES ELLISON, }
HON. ELBRIDGE J. BROADDUS, } *Judges.*

L. F. McCOY, *Clerk.*

BEN ELI GUTHRIE, *Reporter.*

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# CASES DETERMINED

BY THE

## ST. LOUIS AND THE KANSAS CITY

# COURTS OF APPEALS

AT THE

## OCTOBER TERM, 1903.

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*(Continued from Volume 104.)*

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## INA M. DUNLAP, Respondent, v. JOSEPH H. KELLY, Appellant.

**Kansas City Court of Appeals, February 1, 1904.**

1. **BILLS AND NOTES: Evidence: Indorsements.** In an action on a promissory note it is generally necessary that plaintiff prove the indorsements by evidence *aliunde*.

2. ———: ———: ———. However, where a plaintiff who is payee indorses and again comes in possession of the note he is not required to prove the indorsements.

3. ———: ———: ———: **Pleading.** But should such payee plead the indorsement from himself to his indorsee and the indorsee's transfer back to the payee he will be required to prove such indorsements, since he makes them a part of his title and should prove them as alleged.

4. ———: ———: ———: ———. Though such pleading of the indorsements be unnecessary, they become material when alleged and are not mere surplusage. (Cases considered.)



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Appeal from Pettis Circuit Court.—*Hon. George F. Longan,* Judge.

REVERSED AND REMANDED.

*W. D. Steele* for appellant.

(1) The court erred in giving the peremptory instruction asked by plaintiff, but should have given the instruction asked by defendant. A general denial in an action on a promissory note by an alleged indorsee thereof puts in issue the plaintiff's title to the note and the genuineness of the indorsements. The plaintiff offered no proof of the indorsements on the back of said note and said indorsements were not read or exhibited to the jury. Worrell v. Roberts, 58 Mo. App. 197; Bank v. Pennington, 42 Mo. App. 355; Mayer v. Old, 51 Mo. App. 214; Saville v. Huffstetter, 63 Mo. App. 273; Robinson v. Powers, 63 Mo. App. 290. (2) The petition alleges that plaintiff was the payee in the note sued on and endorsed said note to one W. O. Dunlap, who in turn indorsed said note back to plaintiff. Plaintiff utterly failed to prove any of said indorsements and did not prove that plaintiff was the owner of said note at the time suit was brought; all the testimony tending to prove these facts was stricken out by the court on motion of defendant's attorney. An endorsee of a negotiable promissory note must show that his purchase was made from the payee or his assignee. The indorsements on a note do not prove themselves, but must be supported by evidence *aliunde*. Bank v. Pennington, 42 Mo. App. 355; Spears v. Bond, 79 Mo. 471, and cases cited; Mayer v. Old, 51 Mo. App. 214.

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*Sangree & Lamm* for respondent.

(1) The plaintiff, being the original payee of the note, and having custody thereof, as holder, was entitled to recover without any proof of the indorsement by her to W. O. Dunlap, and by him back to her, and regardless of the same. She had the right to strike out said indorsements and ignore them as *functus officio.* (2) But, if essential to prove indorsements, they were in fact proved; for an indorsement may be proved, in the absence of objection, by oral testimony. See Moore v. Hubbard, 42 N. E. Rep. 922 (Ind. App. Feb. 11, 1896), directly in point. (3) There is a class of cases which hold that where an indorsement is material to the title of the indorsee, and same is denied, it must be proved. For example: Worrell v. Roberts, 58 Mo. App. 197; Bank v. Pennington, 42 Mo. App. 355; Mayer v. Old, 51 Mo. App. 214. But all of these cases and others of that class were cases where the notes were held by strangers to the face of the paper and hence are not in point; besides that, these cases must be read with the other class, holding that a bill payable to order will pass by mere delivery, without indorsement, subject to the infirmity of being open to all equities and defenses in favor of payor. Boeka v. Nuella, 28 Mo. 180; Bishop v. Chase, 156 Mo. 158; Weber v. Orton, 91 Mo. 677; Patterson v. Cave, 61 Mo. 439.

ELLISON, J.—Plaintiff sued defendant on a negotiable promissory note and on peremptory instruction from the trial court a verdict was rendered for her.

The plaintiff was the payee in the note and the petition alleged that she transferred it in writing on the back thereof to W. O. Dunlap. That afterwards, said W. O. Dunlap transferred it in writing on the back thereof to plaintiff. That she was the legal owner of the note, etc. The answer was a general denial. At

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the trial plaintiff made no proof of these endorsements. Thereupon counsel for defendant made the point that plaintiff had not proven the case stated in the petition and offered a demurrer to the evidence, which the court refused, and gave a peremptory instruction to find for plaintiff.

Generally, a plaintiff should be required to prove the endorsements on the note; and should make such proof by evidence *aliunde* the endorsements themselves. Nat'l Bank v. Pennington, 42 Mo. App. 355; Worrell v. Roberts, 58 Mo. App. 197; Mayer v. Old, 51 Mo. App. 214; Saville v. Huffstetter, 63 Mo. App. 273; Robinson v. Powers, 63 Mo. App. 290.

But, by way of exception to the rule just stated, plaintiff contends that where the plaintiff is the payee of the note which he has parted with by endorsement and which finally comes back to him through one or more transfers, his possession thereof raises a prima facie title, which will suffice, without proof of the endorsements out of him and back to him again, unless the defendant makes a showing that he is not the owner. In this the plaintiff is right, and doubtless such view of the law guided the trial court in its action on the instructions. The law is clearly stated by the Supreme Court of the United States as follows: . . . "If any person who endorses a bill of exchange to another whether for value, or for the purpose of collection, shall come to the possession thereof again, he shall be regarded, unless the contrary appear in evidence, as the bona fide holder and proprietor of such bill, and shall be entitled to recover, notwithstanding there may be on it one or more endorsements in full, subsequent to the one to him, without producing any receipt or endorsement back from either of such endorsees, whose names he may strike from the bill, or not, as he may think proper." Dugan v. United States, 3 Wheat. 172. The same ruling was made by our Supreme Court in Glasgow v. Switzer, 12 Mo. 395. The same statement of the law is made in 2

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Daniel on Neg. Int., section 1198, and in 2 Randolph on Com'l Paper, sections 715, 716, 717, and 719.

But the point, as made by defendant, involves plaintiff's petition on which the sufficiency of the case made by her must be determined. As already stated, the plaintiff *pleaded* the endorsements and transfers of the note and having done so, though unnecessarily, she must prove the allegations. They can not be rejected as surplusage as suggested by plaintiff. Concerning the rule which governs what may be termed immaterial allegations and distinguishes them from mere surplusage, it is said: "The statement of immaterial or irrelevant matter of allegations, is not only censured, as creating unnecessary expense, but also frequently affords an advantage to the opposite party, either by affording him matter of objection on the ground of variance, or as rendering it incumbent on the party pleading to adduce more evidence than would otherwise have been necessary. It is therefore of the greatest importance in pleading to avoid any unnecessary statement of facts, as well as prolixity in the statement of those which may be necessary. If a party take unto himself to state in pleading a particular estate, where it was only required of him that he should show a general or even a less estate, title or interest, the adversary may traverse the allegation, and if it be untrue, the party will fail." 1 Chitty on Pleading (p. 325), 252.

In Savage v. Smith, 2 Bl. Rep. 1101, the action was against the sheriff. The declaration stated a judgment and execution. The latter was proven but the former was not. It was held that though unnecessary to aver the judgment, yet it having been done, it should be proved.

In Bristow v. Wright, Douglas (2 pt.), 665, the action was against the sheriff for taking goods without leaving a year's rent. The declaration needlessly stated the particulars of the demise, and it was held that they must be proved as stated. So if the averment be

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made that a person was arrested under a writ endorsed for bail by virtue of an affidavit: The affidavit must be produced, though it was not necessary to allege it. Webb v. Herne, 1 Bos. & Pul. 281.

Lord Kenyon stated the rule in language particularly applicable to this case. After remarking: "Good sense will reconcile all the authorities," he said: "If the plaintiff allege anything which forms a *constituent part of his title* he must set it out correctly" and prove it as alleged. Gwinney v. Phillips, 3 Durnford & East, 643; s. c., 3 T. R. Coming nearer to the identical question in this case we find that in Wayman v. Bend, 1 Campb. 175, there was a note payable to A. B. or bearer. Being payable to bearer it was not necessary to allege that A. B. endorsed it to the plaintiff, but he made the allegation, and it was held that he could not recover without proving it. That case was cited with approval in Buddington v. Shearer, 20 Pick. 477, where it was held that under a statute making the owner *or* keeper of a vicious dog liable for damages done by such dog; if the petition needlessly alleged that the defendant was both owner and keeper, both must be proved.

In a suit on a contract in New York, it was necessary to plead the consideration except where the instrument acknowledged such consideration. In Jerome v. Whitney, 7 Johns. 321, the note sued on was expressed to be for "value received" and it was therefore unnecessary to plead the particular consideration. But the pleader saw fit to allege it and it was held that having done so, he was bound to prove the averment. See also Walrad v. Petrie, 4 Wend. 575.

Where mere foreign matter, irrelevant, not relating to the issue or issues involved, is alleged, it may be disregarded. But, in actions on contracts where immaterial matter is alleged which connects with plaintiff's right to maintain the action, or his title to the subject thereof, such immaterial matter is not mere surplusage.

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Some confusion can be avoided by a proper understanding of what is meant by the word "immaterial." At first thought it seems peculiar that one should be required to prove an immaterial thing. But the meaning is that the thing pleaded is unnecessary to plaintiff's action—that he could have succeeded without reference thereto, but when he sees fit to set forth such matter, then it becomes material. It is an immaterial thing made material by the act and choice of the pleader. So, going back to the quotation from Lord Kenyon; if the matter alleged constitutes a part of the plaintiff's right or of his title, it must be proven however unnecessary it may have been to allege it. The case at bar is as good an illustration as need be found. Plaintiff claims title to the note in suit. It being payable to her and in her possession, it was wholly immaterial that she had transferred it and that it had subsequently been transferred to her again. She being the payee in possession, these facts would have given her a prima facie right which the defendant would have been compelled to meet. But at the same time, the endorsements out of her and back to her, were really constituent parts of her title and she chose to set them out as the particular title by which she held the note. She must therefore prove them as stated.

This rule ought not to be looked upon as technical. It is denied to be so by eminent judges. It begets brevity in pleading, by avoiding what is sometimes lengthy and confusing statements of unnecessary matter. Lord Mansfield stated in Bristow v. Wright, supra, that it "stood upon the best footing; for it prevents the stuffing of declarations with prolix and unnecessary matter, because of the danger of failing in the proof." And he adds that it is a rule which results in the protection of a defendant. For when such allegations are made he prepares his defense, frequently at much trouble and expense, with reference to the special matters stated as the foundation of plaintiff's right. It is highly proper that a plaintiff should be required to make good the

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challenge he puts forth. It is a burden which tends strongly to induce him to omit the statement of everything not necessary to his cause of action.

The judgment will be reversed and the cause remanded. The other judges concur.

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WILLIAM O. BURGE, Administrator, etc., Respondent, v. D. S. DUDEN, Appellant.

Kansas City Court of Appeals, February 1, 1904.

1. **BILLS AND NOTES: Principal and Surety: Pleading: Judgment.** That defendant was a surety known to the payee in a promissory, that for years the principal was solvent and defendant's residence was well known to the payee, that defendant did not know the date of the note nor the post office address of the payee, that the principal had informed him the note was paid, that he did not learn the contrary until the principal was insolvent, and that if defendant had learned of the non-payment when it become due he could have protected himself, do not constitute a defense or estoppel and judgment may be rendered for the plaintiff on such answer.

2. ———: ———: **Notice to Sue.** A surety may give notice to the payee in a note to sue thereon and will be exonerated from liability if suit is not brought; but the passivity of payee without such notice will not release the surety.

3. ———: ———: **Name of Payee.** A surety is presumed to have read a note before he signs it, and can not be heard to claim ignorance of the name of the payee therein.

4. **APPELLATE PRACTICE: Reversal: Statute.** The statute enjoins on the appellate court not to reverse a judgment unless there has been error materially affecting the merits of the action.

Appeal from Henry Circuit Court.—*Hon. W. W. Graves,* Judge.

AFFIRMED.

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*Peyton A. Parks* for appellant.

(1) If a creditor lead a surety to believe the debt is paid, and the surety is injured, he is discharged. Brandt on Suretyship and Guaranty (2 Ed.), sec. 245. (2) The surety who is a joint maker, or promisor, is discharged, if the creditor does not sue the debtor in a reasonable time, and the debtor becomes insolvent in the meanwhile. Pain v. Packard, 13 Johns. 174, 17 Johns. 384. (3) The executors of surety of a bond payable on demand, who are sued four years after its date, and after the obligator became insolvent, are not liable. Weaver v. Shryock, 6 Serg. & R. 262. (4) Where a *cestui que trust,* who is entitled to receive yearly the income from the trust fund, does not demand the income for nineteen years she is guilty of such laches as will preclude a recovery of the unpaid income from the sureties on the trustee's bond. 70 Hun 317; People v. Donnelly, 24 N. Y. Supp. 437; In re Niewands' Estate, 23 Pitt's Leg. J. (N. S.) 385.

*John Cosgrove* for respondent.

(1) Passivity of O. F. Burge did not discharge the defendant from his liability even though he was a surety for Elgers. Daniel on Nego. Instruments, vol. 2, sec. 1339. (2) Treating the defendant as surety for Elgers the rule is the same. Russel v. Brown, 21 Mo. App. 51. (3) The answer set up no defense to the note sued on and the motion for judgment, notwithstanding the answer, was proper practice. Nelson v. Wallace, 48 Mo. App. 193; North v. Nelson, 21 Mo. 360; McQuillan's Pl. and Pro., vol. 1, sec. 461; 11 Ency. Pl. and Pr., pp. 1031 and 1047.

SMITH, P. J.—This is an action which was brought by plaintiff against defendant on a promissory note for $600 payable to the order of the former's intestate one

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year after the date thereof, to-wit, December 5, 1894, at the "Banking House of Salmon & Salmon, Clinton, Mo." The note was executed by defendant and one Elges who was not joined as a defendant.

The answer of defendant Duden admitted the execution of the note sued on and alleged (1) that defendant was merely the surety on said note and so known to be by the payee therein, the plaintiff's intestate; (2) that Elges at the time of the execution of said note and for several years thereafter was solvent; (3) that the residence of defendant was at all times well known to the payee of said note; (4) that defendant did not know at the date of said note, nor until the year 1901 the post-office address of the payee therein; (5) that in 1897 he was informed by Elges that said note had been paid; (6) that if defendant had been advised that said note had not been paid when it became due he could have protected himself; (7) that he did not know until 1901 that said note had not been paid and that at about that time said Elges became insolvent; (8) that plaintiff for these reasons was estopped to maintain this action against him, defendant.

The conclusion of the answer was, that "defendant denies each other allegation contained in the petition." The trial court, on motion of the plaintiff for that purpose, gave judgment on the pleadings. The defendant appealed.

The facts pleaded by the answer manifestly constitute no defense to the plaintiff's action.

The statute put it in the power of defendant to require the payee of said note to bring suit thereon and provided that if such requirement be not complied with that he be exonerated from liability thereon to the payee. R. S., secs. 4500, 4501, 4502.

The answer alleges that the defendant did not know the name of the payee of the note. Having presumably read it before he signed it he could not be heard to claim ignorance of the name of the payee therein.

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He could no doubt have ascertained the postoffice address of the payee had he inquired at the bank where the note was payable. No diligence is alleged to have been exercised by him in endeavoring to ascertain this fact. But, however all this may be, it is manifest that to sustain such a defense—to permit a surety on a negotiable note to become exonerated from his liability thereon upon any such grounds—would be to strike down the commercial value of all bills, bonds, notes and other securities.

The statute, as we have seen, provides for the exoneration of sureties from liability on such instruments and this is most generally the only way it can be accomplished. The passivity of the payee in the note did not have the effect to exonerate the defendant as surety. 2 Daniel on Neg. Inst., sec. 1339; Russell v. Brown, 21 Mo. App. 51. Until he received the statutory notice to sue he could remain passive. Nothing was required of him to keep alive his security. The plaintiff's right of action in his representative capacity is not put in issue by the answer. It stands impliedly admitted.

The statute expressly enjoins that we shall not reverse the judgment of any court unless we shall believe that error has been committed materially affecting the merits of the action.

In view of the admission and allegations of the the answer we can not say that the trial court by its judgment has committed error materially affecting the merits of the action. The judgment is so clearly for the right party that it must be affirmed. All concur.

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GARRARD STRODE, Curator of Eva Bennett, Respondent, v. M. C. CONKEY, Appellant.

**Kansas City Court of Appeals, February 1, 1904.**

1. **MASTER AND SERVANT: Vice Principal Performing Labor: Negligence.** The fact that the vice principal while doing the work of a laborer does the same negligently and thereby injures a servant, does not make him a fellow-servant of the injured party and on that ground save the master from liability.

2. ———: ———: **Evidence: Res Gestae.** A vice principal at the top of a shaft, undertaking to throw a block into a car, missed the same and it fell down the shaft. *Held*, his contemporaneous exclamation as to the servant working at the bottom that if he wanted to work there he would have to learn to dodge, is admissible in evidence.

3. ———: **Instructions: Evidence.** The instructions are reviewed and held not to require a reversal, and the omission of the word "evidence" from an instruction is not a fault.

Appeal from Jasper Circuit Court.—*Hon. J. D. Perkins*, Judge.

AFFIRMED.

*Frank L. Forlow* and *Percy Werner* for appellant.

(1) The act of Frantz in throwing the block into the car which was being loaded with the tools and appliances to be taken down into the mine, was the act of a fellow-servant. Gall v. Beekstein, 173 Ill. 187; Hawk v. Lumber Co., 166 Mo. 121. (2) The admission in evidence of the remarks of Frantz, after the tossing of the block into the car, to the effect that "the dam ——— ——— will have to learn to dodge," was erroneous as not part of the *res gestae*. Barker v. Railway, 126 Mo. 146; Rayer v. Railroad, 84 Mo. App.

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350; Koenig v. Railroad, 173 Mo. 698. (3) The first instruction given on behalf of the plaintiff was erroneous. It instructed the jury as a matter of law that the act of Frantz, boss of the day shift, in tossing the block into the car, was the act of the defendant. (4) The second instruction given on behalf of plaintiff, purporting to give the measure of damages, is erroneous in not only not confining the jury to the evidence in the case, but in not requiring that the damages be in anywise based on the evidence. The verdict was under the evidence, excessive.

*McReynolds & Halliburton* for respondent.

(1) Frantz being in charge of the work and during the absence of Farr, superintendent, having the power to direct the men, when, where and how to work, the men being under his direction and control was a vice principal and not a fellow-servant. And the fact that Frantz also worked along with the men, did not take away from him the position of vice principal and make his acts the acts of a fellow-servant. Steube v. Iron Co., 85 Mo. App. 646; Kelly v. Stewart, 93 Mo. App. 60; Haworth v. Railway, 94 Mo. App. 223; Hall v. Water Co., 48 Mo. App. 364; Hutson v. Railway, 50 Mo. App. 300; Hughlett v. Lumber Co., 53 Mo. App. 87; Gonney v. Iron Works, 61 Mo. 492; Bowling v. Allen & Co., 74 Mo. 13; Stephens v. Railway, 96 Mo. 207; Dayharsh v. Railway, 103 Mo. 570; Schroeder v. Railway, 108 Mo. 322; Miller v. Railway, 109 Mo. 356; Russ v. Railway, 112 Mo. 45; Claybaugh v. Railway, 56 Mo. App. 630; Borden v. Folk Co., 71 S. W. (Mo. App.) 478; Foster v. Railroad, 115 Mo. 166. (2) The statement of Frantz as testified to by witnesses was a part of the *res gestae,* having been made just as the block was thrown and as one of the witnesses testified before it could have possibly have reached Bennett. It was a part of the transaction of Frantz in

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throwing the block, and tends to show that act to be not only negligent but reckless. Pepperdine v. Bank, 84 Mo. App. 234; Ins. Co. v. Fillinghamn, 85 Mo. App. 540; Fowles v. Loan Co., 86 Mo. App. 107; Corbett v. Railway, 26 Mo. App. 621. (3) Declarations are now admitted as a part of the *res gestae* even when a perceptible time has elapsed after the main transaction, if made under the influence of it and so connected therewith as to characterize it. Stevens v. Walpole, 76 Mo. App. 213; Leahy v. Fair Grounds, 97 Mo. 165; Stockman v. Railway, 15 Mo. App. 503; 21 Am. and Eng. Ency. of Law, p. 101. Frantz's declaration was made while transaction was occurring. After the block was started and before it reached Bennett (see evidence of Waddell & Smith) and was part of the *res gestae*. Cunningham v. Railroad, 79 Mo. App. 527; Devlin v. Railway, 87 Mo. 548; State v. Mathews, 98 Mo. 125.

ELLISON, J.—The plaintiff's ward is the infant daughter of R. J. Bennett who was an employee in defendant Conkey's lead and zinc mine, and while engaged in work he was killed through the alleged negligence of defendant. Plaintiff recovered judgment in the trial court.

It appears, at least the evidence tended to show, that one Frantz was defendant's foreman in charge, control and direction of several men who were at work in loading a car at the surface of the mine with tools and material to be carried into the mine, among which was a square block of wood. The car, when loaded, was run down the incline by cable into the mine on a track descending at an angle of about forty-five degrees. The deceased was at work down in the mine as "pump man" at the pump, eight or ten feet from the bottom of the incline. The car was being loaded at the surface, when Frantz picked up the square block and standing off, intending to land it in the car, pitched it over the sides and into the shaft, where it fell to the bottom, striking

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deceased on the head and killing him. As the block was seen not to go into the car, one of the men immediately said to Frantz: "Look out, you are liable to kill that man down there," and he answered, with an oath, that, "if he wanted to work there, he would have to learn to dodge."

It is claimed that since the negligent act was committed by Frantz while doing the work of a laborer, that he and deceased were fellow-servants and consequently defendant is not liable for the latter's negligence in throwing the block. We can not allow the defense. We have recently considered the subject in Donnelly v. Aida Mining Co., 103 Mo. App. 349, where the authorities will be found to the effect that though the negligent act be that of the foreman while himself engaging in the work of those employed under his charge, yet that fact does not cause him to lose his character as vice principal. To the authorities there cited, counsel have added, Russ v. Railway, 112 Mo. 50-53; Haworth v. Railway, 94 Mo. App. 215, 224.

Objection was made to the foregoing statement of Frantz when called to by one of his men as he tossed the block over the car. We think it was properly received in evidence. It was made at the very time of the act and while the block was in course of descent. Cunningham v. Railway, 79 Mo. App. 527; Stevens v. Walpole, 76 Mo. App. 213; Devlin v. Railway, 87 Mo. 545; State v. Mathews, 98 Mo. 125.

We conclude that defendant's objections to the instructions do not require a reversal of the cause. That made to number one, in view of what we have said, is not sound. The objection that instruction number two did not confine the jury to the necessity of arriving at a belief from the "evidence" in the cause: in other words, omitting the word "evidence," is not substantial. Neither was the general character of the instruction objectionable as now understood by the rulings of the Supreme Court. See Parman v. Kansas City, — Mo. —.

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After full examination of the points made against the judgment, we find nothing to justify its disturbance and it will be affirmed. All concur.

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H. H. HARDING et al., Appellants, v. THE CITY OF CARTHAGE, Respondent.

Kansas City Court of Appeals, February 1, 1904.

1. TRIAL PRACTICE: Injunctions: Statute. The chapter of Revised Statutes 1899, relating to injunctions does not undertake to regulate the practice for hearing in such cases where there has been no temporary injunction, and the hearing must be governed by the general provisions of the code, and process may be served returnable to a future term, or the defendant may waive service and enter his appearance thereby giving the court jurisdiction of his person.

2. ———: ———: Filing Answer: Trial. A petition for injunction was filed during the term of court. No temporary injunction was asked for. Process issued returnable to the next term. During the term the defendant appeared and answered, and asked the court to set the case for trial at that term, which was done, *Held*, the appearance and answer made such term the trial term, and the court could set the case down for hearing during said term.

Appeal from Jasper Circuit Court.—*Hon. J. D. Perkins*, Judge.

AFFIRMED.

*Thomas & Hackney* and *Howard Gray* for appellants.

(1) The suit was not for trial at the December term of the court and the court should not have dismissed the same, against the objection of the appellants.

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R. S. 1889, sec. 2042; Matingly v. Bosley, 2 Metc. (Ky.) 443; Gray v. Viers, 33 Md. 18; Clapp v. Rauch, 90 Ill. 468; Osgood v. Grant, 62 N. W. (Neb.) 894; Coler v. Lamb (Sup.), 46 N. Y. 117, 19 App. Div. 236; King v. Meyer, 24 S. E. (Ga.) 32; Harris v. Anthony Salt Co., (Kan. Sup.) 45 P. 58.

*McReynolds & Halliburton*, with *H. J. Green*, City Attorney, for respondent.

(1) The only object of a summons is to bring defendant into court, when petition is filed defendant can voluntarily appear and the court will have jurisdiction. Revised Statutes 1899, section 2013; Davison v. Hough, 65 S. W. 371; 165 Mo. 561. (2) The code not being sufficiently comprehensive to embrace every phase a case may assume; resort must be had as a guide to common law and equitable methods of procedure. Tucker v. Ins. Co., 63 Mo. 588; State ex rel. Macklin v. Rombauer, 104 Mo. 619. (3) The court having jurisdiction over the subject-matter and over the parties could hear and determine the matter especially where as in this case, plaintiffs made no showing that they were or could be injured thereby, and the standing of the case to the June term, 1899, would be injurious to defendant or jeopardize its interests. Railroad v. Donovan, 50 S. W. (Mo.) 286; Union Depot Co. v. Frederick, 117 Mo. 138; Hecht v. Feldman, 54 Ill. App. 144; 2 Encyclopedia of Plead. and Pr., p. 605, par. 9, n. 2; Davison v. Hough, 65 S. W. (Mo.) 371. (4) A court has power to control its own process so that it shall not become an instrument of injustice. Bryant v. Talbot, 135 Mo. 422; Brewing Co. v. Talbot, 135 Mo. 170. (5) Though there is no express statutory authority for the action taken by the court in this case, the inherent power of the court, permits such an order



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in the circumstances shown in this case. Brewing Co. v. Talbot, 135 Mo. 172; State ex rel. Macklin v. Rombauer, 104 Mo. 619; Hamilton v. Whitridge, 69 Amer. Dec. 187; Brodie v. Fitzgerald, 18 S. W. 632.

BROADDUS, J.—This is a proceeding commenced by appellants against respondent in the Jasper county circuit court for the purpose of enjoining and restraining respondent from issuing certain bonds theretofore voted by its citizens to construct an electric light plant and to prevent the erection of such plant. The petition was filed December 23, 1898 (while the December term of court was in session), a summons issued the same day returnable to the June term, 1899, of the said circuit court. No temporary restraining order was asked for or obtained. The summons was served December 24, 1898. On January 3, 1899, defendant entered its appearance in said cause, filed an answer, and filed a motion asking the court to set said cause down for trial during the December term of court, and duly gave appellants notice of the filing of said answer and motion. And on January 28, 1899, the court sustained said motion and set the case down for trial on February 6, 1899. Appellants on February 4, 1899, filed their motion to set aside said order, which motion was by the court overruled. On February 6, 1899, said cause coming on for hearing, appellants failed and refused to appear and prosecute their case, and the court dismissed the case for failure to prosecute the same. On the same day appellants filed their motion to set aside the order setting the case for trial and to set aside the order overruling appellant's previous motion to set aside said order, and to set aside the order dismissing the case for failure to prosecute the case, which motion was by the court overruled, and appellants appealed to this court. Appellants have printed the record substantially in full and the only question in the case is the authority of the cir-

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cuit judge to set the case down for trial at the December term of said court.

The Jasper county circuit court holds four terms a year commencing on the first Monday in March, June, September and December, respectively. The March and September terms are held in Carthage and the June and December terms in Joplin. Chapter 84, Revised Statutes 1889, entitled Injunctions, provides the manner of obtaining injunctions and how they shall be heard and determined, but it only provides for their hearing in cases where a temporary injunction has been obtained. Section 5505 *idem* is as follows: "After the answer is filed, a motion may be made at any time in term to dissolve the injunction, and upon such motion the parties may introduce testimony to support the petition and answer, and the court shall decide the motion upon the weight of the testimony without being bound to take the answer as true." Such injunctions may be granted by the circuit court or judge in vacation and in certain cases by the probate court or the judge thereof in vacation, or by the county court or two judges thereof. Sections 5548-49.

But the chapter in question does not undertake to regulate the practice for hearing in cases where there has been no temporary injunction. It then necessarily follows that the hearing must be as provided by the general provisions of the code. When a petition is filed either in term or in vacation and no temporary injunction is asked, the clerk issues process, as in other cases, returnable to a future term, at which if defendant is served in time as provided by the code, he is required to answer and the case stands for trial. Or, the defendant may waive service of process and enter his appearance which will have the effect of giving the court jurisdiction of his person.

Section 2013, Revised Statutes 1889 (now section 566, Revised Statutes 1899) provides how suits may be instituted, viz.: "By filing a petition and the volun-

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tary appearance of the adverse party; or, by the filing of a petition and suing out process thereon." It may therefore be conceded that as the object of the process is for the purpose of giving the adverse party notice of the proceedings, that his voluntary appearance amounts to a waiver of process, and the court's jurisdiction is as complete as if the process had been served upon him. It is agreed here that the court had jurisdiction of the subject-matter of the suit, and, as we have seen, had jurisdiction of the parties. But the contention is, that the court was not authorized to hear the case at the December term, 1899, during which the suit was begun, but that the June term to which process was returnable was the trial term. Section 2042, Revised Statutes 1889, provides when a defendant served with process shall plead to the petition and when the case shall be triable. But this section refers solely to cases where the defendant is served with process; that is, where it has obtained jurisdiction of his person by notice. It has no reference whatever to cases where the defendant has conferred jurisdiction by his entry of appearance. The section requires service of process to be had for a certain number of days before the beginning of the term. The object of the statute is to give defendant sufficient time after notice to prepare for trial. But if he pleads to the petition he waives timely notice. And it occurs to us that the court is thereby possessed of complete jurisdiction of the case and may or may not proceed with the trial, as the circumstances demand. We can see no good reason why a court when the pleadings of a case are complete should not proceed to trial if the parties are ready. The object of the code is to provide for the speedy administration of justice. Under such circumstances it would be the duty of the court to set a day for trial to enable the parties to make the necessary preparation. In this case plaintiffs were notified of the filing of defendant's answer and of its motion to have a day fixed for trial. The plaintiffs appeared on the 28th of

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January, the time fixed for the hearing of the motion, which the court sustained and set the case for trial on February 6. When the day for trial arrived plaintiffs did not appear to urge any objections to a hearing and their case was dismissed for want of prosecution. The only ground urged here against the action of the court is, that the court had no authority to try the case prior to the return term of the writ. But we are of the opinion that defendant's entry of appearance by filing its answer at the December term made such term the trial term. The issues between the parties had been made on the pleadings. Under such conditions there can be no good reason given why the court may not set a case for trial during the term, as well as at any future term. And the plaintiff need not suffer any hardship by reason of the unexpected appearance of the defendant if sufficient time be given him to make his preparation for trial. The code has provided for all such contingencies. See section 2123, idem. The plaintiffs come into court in the first place asking for a hearing and they should not be allowed to complain of the action of defendant who waives all preliminaries and tenders them a speedy trial. They ought at least to be as vigilant as their adversary they have placed on the defensive.

Affirmed. All concur.

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THE STATE OF MISSOURI ex rel. W. G. DIKE, Relator, v. JOHN A. KINGSBURY et al., Respondents.

Kansas City Court of Appeals, February 1, 1904.

**DRAMSHOPS: Qualified Petitioners: Merchants: Taxpayers: Construction.** A licensed merchant doing business in a block is an assessed taxpaying citizen within the meaning of section 2993, Revised Statutes 1899, and is a qualified petitioner for the granting of dramshop license, and should be counted as against it if his name does not appear on such petition.

Original Proceeding in Mandamus.

WRIT DENIED.

*O. S. Barton* for relator.

(1) The levying of a license tax upon merchants of the city is not an "annual assessment" of the city: "An assessment consists in the two processes of listing the persons, property, etc., to be taxed and of estimating the sums which are to be the guide to an apportionment of the tax between them." Cooley on Taxation, 351. There can be no apportioning and assessing of taxes on merchants' valuations. Revised Statutes, secs. 9130, 9280, 5941 and 5945. (2) But even if the merchant's tax list constitutes a part of the annual statement of the city list made from statements filed on the first Monday in June, 1903, is not a part of the last previous annual assessment. (3) Rules for interpretation require that in determining the meaning of a statute the condition of the law and of pertinent facts at the time of its passage should be taken into consideration. When section 2993 of the dramshop act was passed, merchants' licenses constituted no part of the annual assessment of the city.

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State ex rel. Allen v. Railroad, 116 Mo. 15. And the Legislature has shown no intention of bringing them within the purview of the section. The city ordinance certainly has not done so and the amendment of the statutes regarding merchants' licenses was not intended to have such effect.

*R. M. Bagby* for defendants.

(1) Merchants' stock of goods, wares and merchandise, are now taxable in the same manner as other property and at same rate as real estate. Merchants are required to furnish statements to the assessor. The assessor is required to make tax book for such statements and to return same to the county board of equalization. Said board of equalization, as constituted in Revised Statutes 1899, sec. 9130, equalize said merchants' statements in the same manner as assessment of other property, real and personal. Revised Statutes 1899, sec. 8546. (2) The city of Fayette, by the terms of its ordinances, has the power to collect an *ad valorem* tax upon merchants' stocks in trade and at the same time impose a license tax on the pursuit as a condition to the right to carry on the pursuit. (Ordinances printed in agreed statement of facts, relator's brief.) City of Aurora v. McGannon, 138 Mo. 38. (3) The *ad valorem* tax which merchants pay is not a license or occupation tax, but a personal property tax. City of Aurora v. McGannon, 138 Mo. 46; State ex rel. v. Tracy, 94 Mo. 217; City of Kansas v. Johnson, 78 Mo. 661. It follows then that the taxes of Hancock & Campbell on their stock of goods due and payable on or defore November 1, 1903, was a personal property tax and not a license or occupation tax. (4) The statements filed by merchants with the assessor on the first Monday in June of the year 1903 and the levy of the *ad valorem* tax upon such statements, constituted the annual assessment of merchants' stocks of goods, wares and merchandise for the

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year 1903. And being the last assessment just previous to the filing of relator's petition for a dramshop, it necessarily follows that it was the last previous annual assessment so far as these merchants are concerned, and the law (R. S. 1899, sec. 8546), requiring the sums of valuations of merchants' statements to be included in and made a part of the total valuation of property taxable for all purposes, it must follow that this assessment of Hancock & Campbell is a part of the last previous annual assessments of the city of Fayette.

BROADDUS, J.—The relator applied to the county court of Howard county during the November term, 1903, thereof for a license to keep a dramshop in what is known as the Opera House block in Fayette, a city of the fourth class. It is admitted that he is a proper person to receive a dramshop license and that he has complied with the law, provided his petition is subscribed to by the names of two-thirds of the assessed taxpaying citizens and guardians and minors owning real estate in said block as shown by the last previous annual assessment and vote of the city as required by section 2993, Revised Statutes 1899, under which he made his application. The petition is signed by the names of fifteen admitted, qualified signers. Seven admittedly qualified signers did not sign the petition. The defendants, composing the county court, not only counted the seven mentioned, but also counted W. A. Hancock and J. B. Campbell as qualified signers, and refused petitioner a license on the ground that he did not have the requisite two-thirds qualified signers as provided by the statute. It is agreed that if the two persons mentioned were improperly counted then the county court should have issued to petitioner a license, otherwise, the action of the court was proper.

It is conceded that the said Hancock and Campbell own a stock of merchandise in said block and their names appear upon the merchants' tax book of the city

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of Fayette made from statements filed on the first Monday in June, 1903, for the highest amount of goods on hands between the first Monday in March and the first Monday in June, 1903, but their names do not appear in statements filed on the first Monday of June, 1902. And that the merchants' tax book of the city is made from a certified copy of the lists obtained from the county clerk after such lists had been filed with the county treasurer and passed upon by the county board of equalization.

The relator contends that the said Hancock and Campbell were not assessed taxpayers.

Chapter 129, Revised Statutes 1899, provides that merchants shall be licensed and prohibits them from doing business as such until they have obtained a license therefor, and in order to obtain such license they must give bond with approved security for the payment on the first day of November, next thereafter, to the collector of the county, of all taxes which may then be due from them for the twelve months ending on the first day of November, next, upon his license as such merchant. Section 8542 provides that merchants shall pay an *ad valorem* tax equal to that which is levied upon real estate, on the highest amount of all goods which they may have on hand at any time between the first Monday in March and the first Monday in June, in each year. The ordinances of the city have a similar provision. Section 8 thereof provides that, "the *ad valorem* tax equal to that which is levied upon real estate on the amount of goods on which merchants shall be required to pay shall be ascertained from the sworn statements filed in the office of the clerk of the county court of Howard county." And it is made the duty of the city clerk, "to procure a list of all the names of the merchants of the city from said clerk together with the amount of the stock as shown by the statements and enter the same on a merchants' tax book and extend the same upon the calculation as shown by his statement at

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the rate per cent fixed by the board of aldermen on real and personal property.''

Section 8546 of the statutes requires each merchant on the first Monday of June of each year, as stated, to furnish to the assessor of the county a statement of the highest amount of merchandise he may have had on hand at any one time between the first Monday of March and the first Monday of June, next preceding, which statement the assessor is required to enter in a book kept for the purpose and that said book shall be returned by the assessor to the county board of equalization on the first Monday in September in each year for the purpose of equalizing the valuation of merchants' statements. Section 8542 fixes the rate of taxation as equal to that which is levied upon real estate.

Thus, we see merchants are assessed, their assessments are equalized and their taxes are levied. And that is not all, for in order to do business as such merchants they are required to give bond to pay the taxes. It is true that the method pursued in the assessment of their goods and the levying of their taxes is different from that pursued in the imposition of taxation upon other property, but the result is the same.

In the present case, under an ordinance of the city, the city clerk procured from the office of the county clerk the sworn statements of merchants on file in his office entered there on a merchants' tax book and extended the same upon a calculation as shown by his statement of the rate per cent fixed by the board of aldermen on real and personal property. And the assessment so made was the last previous annual assessment, so it seems, that they were in any sense of the term assessed taxpayers within the meaning of section 2993, Revised Statutes. And the fact that merchants' license date from the first day of June of each year and continue for twelve months and that the taxes are not paid until the next year can not affect the question of assessment. The assessments are made in September

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of each year, at which time the assessed become taxpayers within the meaning of the law. It seems plain that said Hancock and Campbell were assessed taxpayers at the date of petitioner's application as shown by the last previous assessment. Therefore, counting them with the seven admitted to be qualified signers the petitioner did not have the required two-thirds qualified signers as required by the statute.

Peremptory writ denied. All concur.

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JOHN H. GEE et al., Interpleaders, Respondents, v. VAN NATTA-LYNDS DRUG COMPANY, Appellant.

**Kansas City Court of Appeals, December 7, 1903, and February 1, 1904.**

1. **FRAUDULENT CONVEYANCES: Unconditional Conveyance: Contingent Liability: Creditors.** In the absence of fraud a mortgage on its face purporting to secure an unconditional debt is not void as to creditors though in fact given to secure a contingent liability.

2. ———**: Mortgagor in Possession: Stock of Goods: Usual Business.** When a mortgagor remains in possession disposing of the mortgaged goods in the usual course of business without accounting in any manner to the mortgagee, the mortgage is void as to creditors. Cases considered and distinguished and the point is affirmed on motion for rehearing.

3. **TRIAL PRACTICE: Uncontradicted Testimony: Duty of Court.** When there is but one witness and no question raised as to his credibility it becomes the duty of the court to declare the effect of his testimony as a matter of law.

Appeal from Nodaway Circuit Court.—*Hon. A. D. Burnes,* Judge.

REVERSED.

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*B. R. Martin* and *Culver & Phillip* for appellants.

(1) The court erred in refusing the demurrer to the evidence. The mortgage under which interpleaders claim title is void as against appellant. Sanford v. Wheeler, 33 Am. Dec. 389; Ayers v. Husted, 15 Conn. 513; Bramhall v. Flood, 41 Conn. 71; Pattison v. Letton, 56 Mo. App. 325; Mokaska Mfg. Co. v. Steele, 36 Mo. App. 496; Bank v. Lime Co., 43 Mo. App. 496; Galbreath v. Cook, 30 Ark. 417. (2) The mortgage is fraudulent and void because to the use of the mortgagor. Lodge v. Samuels, 50 Mo. 204; Gutta Percha Mfg. Co. v. Supply Co., 149 Mo. 538; McDonald v. Hoover, 142 Mo. 484; Leather Co. v. Hardware Co., 57 Mo. App. 297; Grocer Co. v. Miller, 53 Mo. App. 107; Kuh v. Garvin, 125 Mo. 547; Bank v. Powers, 134 Mo. 432; McCarthy v. Miller, 41 Mo. App. 200; Bullene v. Barrett, 87 Mo. 185; Mercantile Co. v. Perkins, 63 Mo. App. 310; Shoe Co. v. Gallant, 53 Mo. App. 423; Rubber Mfg. Co. v. Supply Co., 149 Mo. 550.

*Shinabargar & Cook* for respondents.

(1) An indemnity chattel mortgage is valid as against attaching creditors, although it appears on its face to secure the payment of a definite sum, and parol evidence is admissible to show the true consideration. Sparks v. Brown, 33 Mo. App. 505; Sparks v. Brown, 46 Mo. App. 529; Minor v. Sheehan, 30 Minn. 419, 15 N. W. 687; Goodheart v. Johnson, 88 Ill. 58; Williams v. Alnutt, 72 Mo. App. 62; Biglow v. Casper, 145 Mass. 270; Jones on Chattel Mortgages (4 Ed.), sec. 90. (2) It is insisted by opposing counsel that this provision renders the mortgage void as being to the use of the mortgagor. According to the decisions of our Supreme Court, such a provision does not vitiate the mortgage. Dunham v. Stevens, 160 Mo. 95; State ex rel. v. Fidelity & Deposit Co., 94 Mo. App. 184.

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BROADDUS, J.—The undisputed facts taken from appellant's statement are as follows:

On June 20, 1902, the Van Natta-Lynds Drug Co. sued Geo. Aley, Jr., on account for merchandise sold for $251.46 and obtained a writ of attachment in aid of said suit which was levied upon a stock of drugs belonging to the debtor, situated in his store at Quitman, Mo. Afterwards the respondents interpleaded for the goods, claiming the right to possession by virtue of a chattel mortgage executed to them by Aley, Jr. on March 25, 1902, to secure a note for $1,290. A trial resulted in a verdict and judgment for the interpleaders and the drug company appeals.

It appears from respondents' evidence without dispute that in 1900 Aley, Jr., purchased the stock from Dr. Carter. He borrowed $800 of the purchase price from a Mr. Weber, a banker, to whom he executed a first mortgage on the goods and the balance of the purchase money was secured to Dr. Carter by a second mortgage on the same property. Aley took possession of the store and conducted his business in the usual course of trade for about two years, during which time he paid nothing upon his debt. In March, 1902, Mr. Weber became dissatisfied with his security and thereupon he advanced sufficient money to pay off the Carter mortgage, and Aley executed to Weber his personal note due on or about one year after date for the entire indebtedness, amounting to $1,290 for the payment of which Aley's father and brother-in-law, interpleaders herein, became sureties. At the same time, Aley, Jr., executed to his father and brother-in-law an unconditional note for $1,290 payable on or before one year after date and secured it by mortgage upon his stock of drugs—the mortgage under which they claim title here.

The testimony for the interpleaders is that Aley, Jr., was not indebted to them in any sum and that the

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note and mortgage was given to indemnify them against any loss they might sustain as sureties upon the Weber note. But the note upon its face is an unconditional promise for value received to pay the sum of $1,290 at maturity and the mortgage upon its face purports to secure an absolute existing indebtedness evidenced by the note aforesaid in consideration of the sum of $1,290 paid by the interpleaders to the mortgagor. The mortgage provides that "if the mortgagor shall pay to the mortgagees the aforesaid sum of $1,290 according to the terms of said note," it shall be void, otherwise the mortgagees are empowered to take and sell the property and apply the proceeds to the payment of said note. In other words, the note and mortgage which was duly recorded, created and secured an apparent indebtedness which, it is conceded, never in fact existed, for the interpleaders had paid nothing upon the Weber note nor had had they assumed the payment of it. It was further provided in the mortgage that until default or until such time as the mortgagees should deem themselves insecure the mortgagor might remain in possession of the property with "permission granted (him) to sell at retail from the above stock and to apply the proceeds on said note as the same can be spared from running expenses of said business." From the time the mortgage was given to the levy of the attachment, Aley, Jr., continued in possession of the store and conducted his business, buying and selling just as he did before the mortgage was given, during which time he paid but $100 on the Weber note. The interpleader Gee (who was the only witness) testified that he lived seven or eight miles from Quitman, that he was the brother-in-law of the mortgagor and had been for twenty-five years; that after the giving of the mortgage and the levy he was in Aley's store three or four times; that Aley, Jr., was in possession, running the business, selling his goods in the regular way and buying from wholesale houses whatever was necessary, if he needed anything, just like any other

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merchant; that there was no difference in the manner in which the business was conducted before and after the mortgage was given; that he did not know that Aley, Jr., was buying from the wholesale houses partly on credit and partly for cash but supposed he was, that being his idea of the way Aley was doing, that there was no agreement or understanding as to what Aley, Jr., was to receive for his services nor what the expenses were to be, nor was there any limit put upon them, nor did the interpleaders know how much had been used for expenses; that the mortgagor made no report or account of either his expenses or sales and none was required or requested; that none of the proceeds were turned over to the interpleaders nor up to the time of the levy had the interpleaders required the mortgagor to apply any of the proceeds of the sales to the payment of the debt, because it was not due; and that the mortgagor "had been permitted to run that business since the execution of the mortgage just as he had before that mortgage was given." Gee further testified that he and his father-in-law took the mortgage to secure themselves and so that George could go on with his business. The evidence showed that at the time the interplea was filed that no default had occurred in the mortgage but as the interpleaders "deemed themselves insecure," they claimed the right to possession under the clause in the mortgage which authorized them to take possession on that ground.

On these undisputed facts disclosed by respondents' evidence, it is insisted by appellant that the mortgage is invalid and that the court erred in refusing a demurrer to the evidence. Error in the instructions is also assigned. Appellant contends that the mortgage is void for the reason that it discloses that its object was to secure an indebtedness that did not exist; that the note evidenced a fictitious lien; and that both concealed the actual liabilities of the mortgagor, and the interest he had in the mortgaged goods, which was calculated to

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deceive his creditors. It is not denied that as between the parties thereto the mortgage in question is valid and that it was competent to show that, notwithstanding it purported on its face to be for an existing indebtedness, in fact it was in the nature of an indemnity. Williams v. Alnutt, 72 Mo. App. 62; Sparks v. Brown, 33 Mo. App. 505.

In Ayers v. Husted, 15 Conn. l. c. 513, the court held: "The tendency of an absolute, unconditional note, given merely for the security of one who has assumed only a conditional liability for the maker, is directly to delude the creditors of the maker, and to mislead them as to his resources for the payment of his debts." See also, Sanford v. Wheeler, 33 Am. Dec. 389 (13 Conn. 165); Bramhall v. Flood, 41 Conn. 71; Pattison v. Letton, 56 Mo. App. 325; Molaska Mfg. Co. v. Steele, 36 Mo. App. 496, and Galbreath v. Cook, 30 Ark. 417, have no application to the question under consideration. We find only one decision in this State decisive of the question, viz.: Sparks v. Brown, 33 Mo. App. 505, the holding being that in the absence of fraud, a mortgage on its face although purporting to secure an unconditional debt, yet in fact to secure a contingent liability, is not void as to creditors. And so it was held in Blencoe v. Lee, 12 Bush (Ky.) 358; Goodheart v. Johnson, 88 Ill. 58. Consistency at least requires that we adhere to a former decision of this court, especially where it is founded upon respectable authority, although it may appear that other courts of equal respectability have held differently.

It is claimed that as the evidence showed that the mortgagor was permitted to remain in possession and sell his goods in the regular course of trade without being obligated to apply the proceeds to the mortgage debt and was permitted to run the business as he did before the mortgage was given, the mortgage is to the use of the mortgagor and void as to creditors. In Rubber Mfg. Co. v. Supply Co., 149 Mo. 538, it was

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held: "If the grantor remains in possession after having made a deed of trust on his stock of goods for the benefit of another, and conducts the business as he had previously done, with no obligation to turn over the proceeds to the beneficiary, his conduct is fraudulent in law." In McDonald v. Hoover, 142 Mo. 484, the holding was: "The same facts that will render a conveyance void if expressed on its face will also render it void if proven *aliunde.*" Rubber Mfg. Co. v. Supply Co., supra. There are many cases in this State in harmony with the latter case but we do not deem it necessary to cite them as the law is too well settled for dispute. And it seems that the court so held in instruction number one given for plaintiff.

The evidence disclosed that the mortgagor remained in possession of the goods with the knowledge and consent of plaintiff and conducted the business as he had previously without being required to turn over the proceeds to the mortgagees or to the banker, Weber, the payee in the note for which interpleaders were the sureties for the mortgagor, Aley, Jr. As already set out herein, the only witness who testified in the case was the plaintiff Gee who stated that he did not know that Aley, Jr., bought goods partly on credit and partly for cash, but he supposed that he did, which was equivalent to knowledge of the fact. Under these undisputed facts it was the duty of the court to have instructed the jury peremptorily to return a verdict for defendant.

But our attention is called to later decisions of the appellate courts in which it is claimed that the ruling in Rubber Mfg. Co. v. Supply Co., ante, has been modified, viz.: Dunham v. Stevens, 160 Mo. 95; State ex rel. v. Fidelity Co., 94 Mo. App. 184. In the former the holding was: "A mortgage of a stock of goods is not rendered fraudulent by the fact that the mortgagor is to remain in possession and sell in the usual course of trade, if he is required to account to the mortgagee of



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the proceeds of his sales, to be applied to the mortgage debt." The same rule is also announced in the Fidelity Company case. But it is not perceptible that these two cases are in the least in conflict with the Rubber Mfg. Co. case. The difference lies in the fact that in the two former cases the mortgagor was required to account for the proceeds of sales while in the latter he was not, and it is the latter fact that makes the mortgage fraudulent.

There was no conflict in the evidence as there was but one witness who was one of the plaintiffs, and no question being raised as to his credibility, it became the duty of the court upon this uncontradicted testimony to declare the effect of his testimony as a matter of law.

Under this undisputed evidence the mortgage became fraudulent in law and the defendant's demurrer should have been sustained. The cause is reversed.

## Opinion on Motion for Rehearing.

BROADDUS, J.—It is still insisted by respondents that the court misapprehends the effect of the decision in Dunham v. Stevens, 160 Mo. 95. In the original opinion we held that the ruling in Rubber Mfg. Co. v. Supply Co., 149 Mo. 538, had not been modified by that in Dunham v. Stevens, supra. The contention of the respondents therefore is to the effect that in the latter case the holding is that, where a mortgagor by the terms of the mortgage is permitted to remain in possession of the mortgaged goods and to sell at retail and apply the proceeds on the debt, his failure, by the permission of the mortgagee, to make such application does not render the mortgage void as to creditors. It is not conceivable that the court intended to enunciate a conclusion so radically opposed to the well-established rule that the permission of the mortgagee to the mortgagor to sell and divert the proceeds of mortgaged property from the payment of the debt is void as to creditors. The object of the provision in the mortgage to allow the mortgagor

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to remain in possession and to sell is that the proceeds shall go to the extinguishment of the debt; otherwise, such a provision would afford the most effective method that could be devised to defeat creditors in the collection of their claims.

In Dunham v. Stevens the mortgagee acted in good faith. For eighteen months the mortgagor returned to him each month a statement showing the amount of purchases and sales of goods and profits after deducting expenses. Not much was paid on the debt as the profits were small. The mortgagor kept up the stock to about its original value and the business was continued until the mortgagee became dissatisfied because his debt was not being paid as the mortgage provided, when he asserted his right to take possession.

Not so in this case. The mortgagee made no inquiries whatever as to what the mortgagor was doing in the business and the mortgagor made no reports to them, and they never at any time took notice of what the mortgagor was doing but supposed he was conducting the business as he had been before the giving of the mortgage—that is, in the usual and ordinary course for his own benefit. When it was shown that the mortgagor had not applied the proceeds of the sale of the goods upon the debt it made a prima facie case against the mortgagees at least which they did not attempt to meet.

The motion for rehearing is overruled.

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## GEORGE ZOLLINGER, Appellant, v. W. M. DUNNAWAY et ux., Respondents.

**Kansas City Court of Appeals, February 1, 1904.**

1. **HOMESTEAD: Execution: Residence.** Visible occupancy of premises as the head of a family at the time of the levy of a writ fixes the homestead rights of the defendant; and if he lives away from the premises an *animus revertendi* is not sufficient to preserve the homestead right. And the facts in this case are insufficient to show a homestead right.

2. **———: Exchange: Sale: Reasonable Time.** One may exchange his homestead for another and a reasonable time is allowed for removing from the one to the other; or he may sell with the intent to reinvest in another homestead and a reasonable time will be allowed for such purpose, but occupancy can never be disassociated from the homestead. (Cases considered and distinguished.)

Appeal from Henry Circuit Court.—*Hon. W. W. Graves,* Judge.

REVERSED.

*C. C. Dickinson, Jno. I. Hinkle, C. D. Corum* for appellant.

(1) "It is the visible occupancy of the premises as the head of a family at the time of the levy of the writ which fixes the homestead rights." Brewing Ass'n v. Howard, 150 Mo. 451; Barton v. Walker, 165 Mo. 30; Finnegan v. Prindeville, 83 Mo. 517; Goode v. Lewis, 118 Mo. 357; Tennent v. Pruitt, 94 Mo. 145; Rouse v. Caton, 168 Mo. 296. (2) Our homestead statute is transplanted from Vermont. And the rulings there are in harmony with the decisions of this State. True v. Marrill, 28 Vt. 672; Davis v. Andrews, 30 Vt. 678; Spalding v. Cram, 46 Vt. 292; Whitman v.

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Field, 53 Vt. 554; Thorp v. Thorp. 70 Vt. 46. (3) The decisions in other States are to the same effect. The courts almost universally holding that a homestead must be a place of actual residence. McConnaughty v. Baxter, 55 Ala. 379; Tiller v. Bass, 57 Ark. 179; Babcock v. Gibbs, 52 Cal. 627; Fisher v. Cornell, 70 Ill. 216; Givans v. Dewey, 47 Iowa 414; Ingels v. Ingels, 50 Kan. 755; Kelly v. Dill, 23 Minn. 435; Austin v. Stanley, 46 N. H. 51; 2 Kerr on Real Property, sec. 1550. (4) In order that premises may be exempt, before actual occupancy, because of intention to occupy them as a homestead there must be something more than an undefined floating intention to build and dwell thereon. There must be a clearly defined intention to occupy the premises presently and not an intention to occupy them at some indefinite time in the future." 15 Am. and Eng. Enc. of Law, p. 579; Keys v. Bump, 59 Vt. 391; Swenson v. Kiehl, 21 Kas. 533; Faut v. Talbott, 81 Ky. 23; Coolidge v. Wells, 20 Mich. 79; Evans v. Coleman, 92 Mich. 427; Power v. Bird, 18 Mont. 22; Archibald v. Jacobs, 69 Tex. 248; Spaulding v. Crane, 46 Vt. 292; Bugbee v. Bemis, 50 Vt. 216; Bank v. Gale, 42 Vt. 27; Kerr on Real Property, sec. 1552, and cases cited; Currier v. Woodward, 62 N. H. 63; Christy v. Dyer, 14 Ia. 438; Elston v. Robinson, 23 Ia. 211; Oliver v. Snowden, 43 Am. Rep. 338; Groshalz v. Newman, 21 Wal. 486; Stoval v. Hibbs, 32 S. W. 1087; Luke v. Nolan, 81 Mich. 112; Batts v. Scott, 37 Tex. 59.

*Campbell & Duckworth* and *O. L. Houts* for respondents.

(1) The intention of the party claiming the homestead is a material matter in determining whether or not the homestead was abandoned. Mills v. Mills, 141 Mo. 195; Bealy v. Blake, 153 Mo. 657; Holmes v. Nichols, 93 Mo. App. 513; Thompson on Homesteads, sec. 265;

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Duffy v. Willis, 99 Mo. 132; Macke v. Byrd, 131 Mo. 682. (2) Land acquired by exchange of a homestead, or purchase with the proceeds of a former homestead, need not necessarily be occupied immediately. A reasonable time must be allowed for the debtor to make the change, and to remove his family to the new home; and where there is no unreasonable delay, it will be exempt during the time intervening between its acquisition and its occupancy, and what is a reasonable time must be determined by all the facts and circumstances surrounding each case. 15 Am. and Eng. Enc. of Law, 601; Goode v. Lewis, 118 Mo. 357; Waples, Homestead & Ex., 438. (3) The case of St. Louis Brewing Ass'n v. Howard, 150 Mo. 445, relied upon by appellants, is so dissimilar in regard to the facts as to be inapplicable to this case. In that case the execution debtor never had a homestead in the property. In this case the only question is, was the homestead abandoned? (4) The question of homestead is more one of fact than of law, and the court having found from the evidence that respondents had a homestead in the 80 acres of land in question, this court will not disturb the finding. Dredging Co. v. Coal Co., 77 Mo. App. 362; Smith v. Zimmerman, 51 Mo. App. 519; Gaines v. Fender, 82 Mo. 509; Furniture Co. v. Davis, 86 Mo. App. 296.

ELLISON, J.—Plaintiff obtained a judgment against defendant and in attempting to enforce satisfaction thereof the sheriff levied an execution on eighty acres of land owned by him which did not exceed the value of homesteads as prescribed by statute. The defendant claimed the tract as his homestead and therefore exempt. The trial court sustained the claim and the plaintiff duly appealed to the Supreme Court from whence it was transferred to this court.

Accepting the testimony of the defendant in his own behalf we feel constrained to rule that his claim is ill founded. It appears that he is the head of a family

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and has been all the time during the period covered by this controversy. About seven years prior to the levy of the execution he lived on a one hundred and sixty acre tract of land as a homestead. He moved from this and rented a smaller tract though he intended to move back again when he got in better financial condition. He never returned, but after living on the rented land for about two years, he exchanged the one hundred and sixty acre tract for the eighty in controversy on which there were no buildings, getting some money for the difference. He made this exchange also with a view of bettering his condition and with the intention of some time, when he could find himself financially able, of building a house on it and residing thereon. He then gave up the rented tract and moved with his family into the town of Windsor about 18 miles from the land in controversy. He has lived in the town continuously since, in a rented house, being a period of about five years, and has been engaged in business in the town and voted there at the local and general elections. He however says that all this time he has intended, when he could find himself able, to build a house on the eighty and reside there.

What was said by Judge Marshall in St. Louis Brewing Ass'n v. Howard, 150 Mo. 445, may well be repeated here:

"The defendant proceeded upon the idea that he could leave the property, be absent for years, engage in business elsewhere, keep his family in other places, live in rented houses and yet if all the time he claimed the property as a homestead and had an intention to return to it at some future time and occupy it as such, it was still his homestead in law and hence exempt from sale under legal process. In this, he was in error, for whilst such *animus revertendi* would preserve his residence in this State, it would not preserve his right to a homestead in this property, even if under the evidence in this case it could fairly be said that he ever had such a home-

stead right, which we do not think the evidence warrants, for it is a visible occupancy of the premises as the head of a family at the time of the levy of the writ which fixes the homestead rights of the defendant." That statement of the law is supported by a number of decisions. Barton v. Walker, 165 Mo. l. c. 30; Finnegan v. Prindeville, 83 Mo. 517; Tennent v. Pruitt, 94 Mo. 145.

It is true that one may exchange his homestead for another and that reasonable time will be allowed him in which to remove from one to the other. Or, he may sell one homestead with intent to invest the proceeds in another and a reasonable time will be allowed for such purpose. State ex rel. v. Hull, 74 S. W. Rep. 888. But the idea of occupancy can never become disassociated from the homestead. Its name implies that. The time of going from a former to a later homestead, will, of course, be governed by reasonable circumstances, but the circumstances detailed by defendant do not fill that requisite. In Goode v. Lewis, 118 Mo. 357, the deeds for exchange were made and Lewis intended to remove to his newly acquired place as soon as he recovered from sickness then upon him. He did not recover and in two months died without having carried out his intention. The court held such circumstances excused the delay and the failure to occupy. Considering defendant's conduct and citizenship in residing elsewhere for several years; that the premises have no house enabling them to be occupied, and no more prospect of ever having than there has been in the past; it would be manifestly unfair to permit him to treat them as a homestead and a bar to the rights of his creditors. Ross v. Hellyer, 26 Fed. Rep. 413.

The only case cited by defendant which, in its facts, lends any color to his claim is that of Duffey v. Willis, 99 Mo. 132. There it was said that each case must rest upon its own peculiar facts, and while the claim made was upheld there though there was an absence of near

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three years from the homestead formerly occupied, yet the property had only been rented by the month with a view of the claimant returning at any time. And before the indebtedness accrued which was the foundation of the proceedings against the property claimed, the owner's agent had dismissed the tenant preparatory to his return. The case is as far as any has gone, and the view that the homestead had not been abandoned was not made clear without some effort. But even if considered as opposed to the view we take of this case (which we do not) we must follow the later cases we have cited.

The result is that the judgment quashing the execution is reversed. All concur.

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SARAH V. HUNT, Respondent, v. ANCIENT ORDER OF PYRAMIDS, Appellant.

Kansas City Court of Appeals, February 1, 1904.

**APPELLATE AND TRIAL PRACTICE: Weighing Evidence: Court's Discretion.** When there is substantial evidence to sustain a verdict the appellate court will not weigh it; that is the duty of the jury and the trial court. The trial court has a wide range of discretion, which will not be supervised except in cases of clear abuse. (Cases considered.)

Appeal from Vernon Circuit Court.—*Hon. H. C. Timmonds,* Judge.

Affirmed.

*S. A. Wright* and *C. G. Burton* for appellant.

(1) When unsupported by the evidence, or especially when against the evidence, or when an injustice has been done, it is the duty of the trial court to set aside the verdict and grant a new trial. Bank v. Arm-

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strong, 92 Mo. 265; Rickford v. Martin, 43 Mo. App. 597; Lawson v. Mills, 130 Mo. 170; Schmidt v. Railroad, 149 Mo. 269; Robinson v. Robinson, 65 Mo. App. 209; Taylor v. Railroad, 163 Mo. 183; Lockwood v. Ins. Co., 47 Mo. 50. (2) The appellate court will interfere whenever the discretion of the trial court in overruling a motion for a new trial has been arbitrarily or unsoundly exercised; or wrought manifest injustice; or whenever there is no substantial evidence to support the verdict, or when the inferences drawn by the jury are unreasonable or whenever the verdict is obviously the result of passion, prejudice or partiality. Reid, Murdock & Co. v. Lloyd & Mooreman, 61 Mo. App. 646; Whitsett v. Ransom, 79 Mo. 258; Bank v. Wood, 124 Mo. 72; O'Donnell v. Railroad, 7 Mo. App. 190; Lionberger v. Pohlman, 16 Mo. App. 392; State v. Young, 119 Mo. 495; State v. Prendible, 165 Mo. 329; Taylor v. Fox, 16 Mo. App. 527; Walton v. Railroad, 49 Mo. App. 620; Powell v. Railroad, 59 Mo. App. 335; Borgraefe v. Knights of Honor, 22 Mo. App. 127; Lovell v. Davis, 52 Mo. App. 342.

*Scott & Bowker* for respondent.

(1) Where a party fails to demur to the evidence and offers an instruction on the theory that there is evidence to support a certain issue, he can not complain in the appellate court of an insufficiency of testimony to support the verdict. Inglehardt Co. v. Burrell, 66 Mo. App. 117; Seitler v. Bischoff, 63 Mo. App. 157; James v. Hicks, 76 Mo. App. 108; Hopkins v. Woodmen, 94 Mo. App. 402. (2) Where there is any testimony to support a verdict, the appellate court will not set it aside. Taylor v. Short, 38 Mo. App. 21; Tower v. Pauley, 76 Mo. App. 287; State v. Jacobs, 152 Mo. 565; James v. Insurance Company, 148 Mo. 1. (3) The appellate courts do not weigh the testimony and will not interfere with the discretion of the trial courts in re-

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fusing to grant a new trial on the ground that the verdict is against the weight of the evidence. Crossan v. Crossan, 169 Mo. 631; State v. Gleason, 172 Mo. 259; State v. Jacobs, 152 Mo. 565.

ELLISON, J.—The plaintiff is the widow of W. T. Hunt, deceased, who had issued to him by defendant a benefit certificate of life insurance payable to her for $1000. On Hunt's death defendant refused payment, whereupon she brought this action and prevailed in the trial court.

The sole ground for the appeal is the refusal of the trial court to sustain the motion for new trial, and the sole reason urged by defendant why it should have been sustained is that there was not sufficient evidence upon which to base the verdict. The certificate provided that if Hunt committed suicide no recovery could be had thereon. The defense was that he did commit suicide, which was denied by plaintiff, and that was the sole issue to which the evidence in the case was addressed. The theory of the defense is that the deceased was somewhat unbalanced in mind resulting from sickness or sunstroke, or both, and that on the day of his death he was depressed because of his wife's intention to leave home for a visit to friends and relatives in Colorado. That being in such mental condition, he purchased a pistol at a store in the city of Nevada where he lived and returned home to kill himself. That members of his family seeing he had the pistol, endeavored to get it from him and failed and that he then shot himself. The theory of the plaintiff is that he was not mentally wrong. That on the day in question he was in good health and usual spirits. That he bought the pistol to kill some troublesome and annoying stray cats that were prowling about the premises. That the endeavor to have him give up the pistol was not to prevent his using it on himself, but to prevent annoyance and fright to the family and to boarders in the house, some of whom were sick. That in

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slipping or stumbling and involuntarily throwing up his arms, the pistol was accidentally discharged into his head, causing his death.

There is no doubt that the evidence given in behalf of the defendant made a strong case of suicide. So strong, indeed that if the jury had returned a verdict for defendant, no one could have called it in question. There was evidence and circumstances going to show that plaintiff, her sister and her mother knew the moment they saw deceased with the pistol that he intended bodily harm to plaintiff or to himself, or both. It showed that plaintiff first saw the pistol while they were alone in the parlor and that she struggled to get it from him when it was discharged, perhaps accidentally, but the report alarmed the others and the sister seems to have immediately thought, without being told, that he had attempted plaintiff's life. Plaintiff's mother and sister followed deceased out of the house. The mother seeing the pistol in his hand asked him to give it up. It was again discharged, perhaps accidentally, but great excitement existed and the women were crying aloud and someone called a man passing along the street to go for a policeman, which he did. One or more neighbor women came over and all seemed to recognize that an extraordinary and terrifying condition prevailed. It was at this point that he shot himself and fell in the yard.

But when the case was thus made for defendant, it may be even stronger than we have put it, the plaintiff introduced herself, mother and sister and others. Their testimony went directly to support the theory in her behalf which we have already stated. If the jury believed these witnesses their testimony undoubtedly supported the verdict. Plaintiff's mother testified that when she saw deceased in the yard, near the porch or platform entrance to the kitchen, she standing in the kitchen door, the pistol "went off" and he said, "Oh, I didn't go to do that." She then told him to give the pistol to her

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and he turned tawards her and started to step up on the platform, as she thought, to hand it to her, but as he stepped up he seemed to lose his balance; one expression of the witness was that he "stepped off backwards; he lost his balance." At any rate, he fell, or stepped backwards off of the platform, and as he did so, his hands were thrown up and while in that falling position the discharge of the pistol occurred which sent the ball through his head, going in on the right and coming out on the left side. In addition to the affirmative testimony there are two circumstances which the jury could well consider in behalf of plaintiff's theory. One is that if deceased was bent on killing himself, he had an opportunity to do it before his action attracted attention, and even afterwards while in the yard, before the fatal discharge. The other is that the physician who was immediately called, testified that there was no burning of the hair or powder marks on the head—nothing but the entrance of the bullet. That fact would indicate that the pistol was fired at arm's length; an unusual and uncertain way for a suicide. It ought furthermore to be considered that the jury could have believed deceased was mentally unsound and that his action was as detailed by some of the testimony in defendant's behalf, and yet the fatal result have come about by accident, as described by plaintiff's mother.

When there is any substantial evidence to sustain the verdict, the appellate court will not weigh it; that is the duty of the jury and trial court. Crossan v. Crossan, 169 Mo. 637; State v. Gleason, 172 Mo. 259; State v. Jacobs, 152 Mo. 565.

The law as to the duty of courts on appeal in cases involving the question of the sufficiency of evidence to sustain a verdict, has been gathered and set forth by the respective counsel in their briefs. But in considering such cases, it should not be forgotten that a trial court has a far wider range of discretion than has an appellate court. The former has a right to pass upon the weight

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of testimony, while the latter has not. And its discretion, except in cases of clear abuse, will not be supervised. And when a point is made on appeal, as to the sufficiency of evidence the appellate court always has in view the fact, that the trial judge with more power and better opportunities for correct judgment has refused to interfere. Ried v. Ins. Co., 58 Mo. 421; Bank v. Armstrong, 92 Mo. 265; State v. Young, 119 Mo. l. c. 525; Hull v. Railroad, 60 Mo. App. 593; Reid v. Lloyd, 61 Mo. App. 646.

The point made in argument by defendant as to the duty of the trial court to promptly grant another trial when it considers the verdict to be against the weight of the evidence and that injustice has been done, is sustained by a large number of decisions collected by counsel. As already stated, we fully recognize that such is the duty of that court. But in this case, there is substantial evidence to support the verdict; and we have no means, therefore, of ascertaining that the trial court did not fully perform its duty. We must presume that it did, until it is made clearly to appear that it did not. The rule governing appellate courts may be stated to be this: that whenever the record discloses substantial evidence which, if believed, will support the verdict rendered, then an appellate court can not say that the trial court had not exercised its discretion fairly and properly. The appellate court presumes that the trial court has performed its duty as the law directs. That presumption abides up to the point of a total absence of evidence of substantial character.

The judgment, with the concurrence of the other judges, is affirmed.

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BARBER ASPHALT PAVING COMPANY, Respondent, v. LEO J. MUCHENBERGER et al., Appellants.

**Kansas City Court of Appeals, November 23, 1903, and February 1, 1904.**

1. **MUNICIPAL CORPORATIONS: Paving Ordinance: Time of Publication: Sunday: Statutory Construction.** The statute that no person shall be served with any writ or process on Sunday, has no application to the notice required to be published by section 5661, Revised Statutes 1899, before a city of the second class can pass an ordinance requiring the reconstruction and paving of a street; and publication for five days before such action of the council is sufficient, though the last day was Sunday.

2. ———: ———: ———: ———: **Finding of Council.** The finding and declaration of the common council that a publication for a special ordinance had been made for five days before their action on such ordinance is conclusive for all purposes.

3. ———: ———: **Repairs: Instructions: Court's Finding.** In a suit on a taxbill for the improvement of a certain street, the court gave an instruction that if the work done under the contract was repairs then the finding should be for the defendants, and then found the facts against the defendants on evidence tending to support such finding. *Held*, judgment must stand.

Appeal from Buchanan Circuit Court.—*Hon. W. K. James,* Judge.

Affirmed.

*James F. Pitt* for appellants.

(1) Under the statute, Revised Statutes 1899, sec. 5661, locally known as the Haynes law, and being the same act found in Laws 1899, p. 79, the power of the council to charge defendant's property depends upon a service upon him by five days' publication of the pro-

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posed ordinance. This is not five days' notice. This publication is in the nature of process, and service can not be made on Sunday. Sunday can not be counted as a publication day. R. S. 1899, sec. 4683; Dennison v. Kansas City, 95 Mo. 416; Schwed v. Hartwitz, 23 Colo. 187; Dumars v. Denver, 65 Pac. 518; Scammon v. Chicago, 40 Ill. 146; Ormsby v. Louisville, 79 Ky. 197; Sewell v. St. Paul, 20 Minn. 511. (2) "One very precise limit to the power to cure these proceedings is this: They can not be cured when there was a lack of jurisdiction to take them. This is a rule applicable to every species of legal proceedings. Curative laws may heal irregularities in action, but they can not cure a want of authority to act at all." McCready v. Sexton, 29 Iowa 356; Groesbeck v. Seeley, 13 Mich. 329; Case v. Dean, 16 Mich. 12; White v. Flynn, 23 Ind. 46; Corbin v. Hill, 21 Iowa 70; Abbott v. Lindenbower, 42 Mo. 162; Wright v. Cradlebaugh, 3 Nev. 341, 349; Young v. Beardsley, 11 Paige 93; East Kingston v. Towle, 48 N. H. 57; s. c., 24 Am. 174; Taylor v. Miles, 5 Kan. 498; s. c., 7 Am. 558; Powers v. Fuller, 30 Iowa 476; Little Rock, etc., v. Payne, 33 Ark. 816; s. c., 34 Am. 55; Smith v. Cleveland, 17 Wis. 556; Newell v. Wheeler, 48 N. Y. 486; Smith v. Sherry, 54 Wis. 114. (3) The work done upon this street was repairs within the meaning of the statute regulating and charging the costs of such work.

*R. A. Brown* and *Scarritt, Griffith & Jones* for respondent.

(1) The publication of the ordinance is sufficient. The law in this State is well settled that in counting statute time, Sunday is not excluded. In City of St. Joseph ex rel. Saxton National Bank v. Landis, 54 Mo. App. 315; Dennison v. Kansas City, 95 Mo. 416; Buchan v. Broadwell, 88 Mo. 31; Adkins v. Railroad, 36 Mo. App. 652; Smith v. Tobener, 32 Mo. App. 601. (2) The work for which the taxbill was issued was reconstruction

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not repairs. Special taxbills, the city shall, in no event, nor in any manner whatever, be liable for on account of work, except as is otherwise provided for in the following section,'' etc. (3) The court gave, at the appellant's request, the following declaration of law: ''If the court believes, from the evidence, that the work in fact done under the contract read in evidence, was repairs to the street improved, then the finding must be for defendants.'' Under this declaration, appellants submitted to the court the question of fact as to whether such work was repairs or reconstruction, and the finding of the trial court thereon is final. Nelson v. Railway, 66 Mo. App. 651. And appellants can not now contend that there is not substantial evidence to support the court's finding. Hopkins v. M. W. A., 94 Mo. App. 402. (4) Under similar facts our appellate courts have held that the work was reconstruction, not repairs. Ritterskamp v. Stifel, 59 Mo. App. 510; Morley v. Carpenter, 22 Mo. App. 640; Farrar v. St. Louis, 80 Mo. 391; Skinker v. Heman, 148 Mo. 354.

SMITH, P. J.—This suit was brought by the plaintiff, the Barber Asphalt Paving Company, to recover upon a special taxbill issued against the defendant's property for paving with asphalt a portion of Felix street in the city of St. Joseph. Defendant set up by special plea two defenses: First, that the service upon the property owners by publishing the proposed ordinance, known as Document 29698, was insufficient in that one of the five days of publication was Sunday, and the service for that reason void and insufficient to confer jurisdiction upon the common council to condemn defendant's property; and, second, that the work ordered and in fact done upon the street was repairs, for which the city, and not the defendant, was liable.

This publication of the proposed ordinance was made May 30th, 31st, June 1st, 2d and 3d, 1900, this



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last date being Sunday. Afterwards, and on the 18th day of June, 1900, this document 29698, so published, was approved as Special Ordinance No. 2695, under which the work was done. On the same day the council also passed an ordinance, No. 2694, finding and declaring that special ordinance known as document 29698, providing for the paving of Felix street from Third to Eighth street, had been published for five consecutive days in the St. Joseph Gazette, the newspaper at the time doing the city printing. The contract was duly let and confirmed by the passage and approval of a special ordinance.

The cause was tried before the court, a jury being dispensed with. The judgment was for plaintiff and defendants appealed. The question to be decided is whether or not said special ordinance ordering the improvement to be made was published for five consecutive days before the passage thereof by the city council as required by section 5661, Revised Statutes. It is not disputed but that the said ordinance was published for five consecutive days before the passage of the ordinance, but it is insisted that as the last day on which it was published was Sunday that it was only published for four days, and for that reason there was an absence of authority in the council to pass it. But if the publication on the last day, which was Sunday, is to be included in the computation, then it sufficiently met the statutory requirement and the said ordinance is not vulnerable to attack on that account.

Cities of the second class, of which the city of St. Joseph was one, have no power under their charter— section 5661, Revised Statutes — to pass an ordinance like that here in question until the publication required by said section 5661 is made. The publication of the proposed ordinance is in the nature of notice to the property holders and is required to be made for the purpose of affording them an opportunity to appear before the common council and interpose any objection

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they may have to its passage. Dennison v. City, 95 Mo. 416. Was this notice given in this case? It can not be denied that it was published for the requisite number of days, but because the last day was Sunday it is insisted that it must be excluded from the count and therefore there was in legal effect no notice whatever.

The statute—section 4683—provides that no person shall serve or execute any writ or process on Sunday. While the publication here was notice and in some respects analogous to the service of a writ of summons by publication, yet it was not the judicial "writ or process" specified in the statute. The prohibition in that statute has reference only to *personal service* of such writs and process. It is obviously inapplicable in any case of constructive service and especially so in cases like the present where there is a statute requiring notice to be given by publication in a newspaper for a stated number of days or period of time. It is in effect conceded that the common council did not pass the special ordinance until after it had been published for five consecutive days or that no opportunity was afforded the abutting lot owners to appear and object to its passage. If five days intervened between the first day of the publication and the date of the passage of the special ordinance, as was the fact, the notice was all that was required to vest in the council the power to pass the ordinance. Drainage Dist. v. Campbell, 154 Mo. 151. The case of City ex rel. Bank v. Landis, 54 Mo. App. 315, was where the ordinance ordering the improvement to be made required the city engineer to advertise for ten days for proposals to do the work. The publication was made for ten days if two Sundays were included in the computation, otherwise not. The rule that in computing statute time Sunday must not be excluded (State v. Green, 66 Mo. l. c. 645; Ex parte Dodge, 7 Cowen 147; Anderson v. Baughman, 6 Mich. 298), was held applicable and accordingly that the publication met the requirements of the ordinance. Clapton v. Taylor, 49

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Mo. App. 117, was where an ordinance required notice of the letting of the contract to be published five days before the time fixed for opening the bids. The publication was made for five consecutive days but the last day was Sunday. It was objected that as the last day of the publication was Sunday that the notice was insufficient to authorize the letting of the contract; but in disposing of this objection it was curtly and correctly said, that the fact that the last day of the publication was on Sunday did not affect the legality of that class of notices.

The notices referred to in the City ex rel. Bank v. Landis, and in that of Clapton v. Taylor, related to matters that affected the substantial rights of the property owners and it was ruled in those cases that a fair compliance with the ordinance requiring the publication to be made was a condition precedent whether prescribed by charter or ordinance. Cole v. Skrainka, 105 Mo. 303. Or, in other words, until the publication was made there was no authority to let the contract. No good reason is seen, if in the computation of the time of the publication of such notices as those referred to in City ex rel. Bank v. Landis and in Clapton v. Taylor, the Sunday inclusive rule is applicable, why that rule may not be properly invoked and applied in the computation of the time of the publication of the notice in the present case. The publication we think sufficiently met the statutory requirement.

But this is not all. The common council by ordinance expressly found and determined that said special ordinance had been published for five days. Section 5661, Revised Statutes, provides that if the common council shall find and declare that such special ordinance has been published for the time and in the manner required, that such finding and recitals shall be conclusive upon all the parties concerned and no taxbill shall be held invalid on account of the insufficiency of such ordinance and notice. The finding and declaration

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of the common council in such cases as this has been declared to be "conclusive for all purposes." Adkins v. Railway, 36 Mo. App. 662; Dennison v. City, supra; Buchan v. Broadwell, 88 Mo. 31. We do not, however, think that the ordinance finding and declaration of the common council was required to render it valid, but that it was valid without that as respects the publication.

II.

Section 5651, Revised Statutes, from which we have previously herein quoted, further provides: "The common council shall have power to cause to be graded, constructed, *reconstructed,* paved or otherwise improved and repaired, all streets, sidewalks, alleys and public highways or parts thereof, within the city at such time and to such extent, and of such dimensions and *with such materials,* and in such manner and under such regulations as shall be provided by ordinance; and all ordinances and contracts for such work shall specify how the work shall be paid for; and in case payment is to be made in special taxbills, the city shall, in no event, nor in any manner whatever, be liable for on account of work except as is otherwise provided for in the following section:" The special ordinance under which the improvement was made required that Felix street between certain designated intersecting streets be paved with an asphalt pavement to consist as follows, towit:

"The concrete base now in place on said street shall be built up where necessary with hydraulic concrete cement of such thickness as to bring its surface parallel to and three inches below the finished surface of the pavement and established grade of the street. Upon this shall be laid a binder course of bituminous concrete one and one-half inches in thickness; upon this binder course shall be placed a wearing surface one and one-half inches in thickness, the matrix of which shall be asphalt; said pavement to be constructed of such material and in such manner that it will endure without the need

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of any repairs for a period of ten years after the completion."

The contract required the work to be done according to the specifications, the requirements of which were:

"All of the old asphaltum shall be removed from the street; the old concrete base shall be replaced, where necessary by new hydraulic cement concrete. New concrete shall be used where no concrete exists, and such new concrete shall not be less than six inches in depth, and the finish surface of the same shall conform to a plane parallel with and three inches below the finished surface of the pavement. Should the earth where new concrete is used be soft or spongy, it must be dug up and repaired with broken stone or with loam well rammed.

"Wherever the concrete base now in place on said street is below a point parallel to three inches below the finished surface of the pavement, new concrete shall be laid on the old of such thickness as to bring its surface parallel to and three inches below the surface of the pavement.

"Wherever the concrete base now in place on said street shall be above a point parallel to and 3 inches below the finished surface of the pavement and the concrete shall be cut down so as to bring its surface parallel to and 3 inches below the finished surface of the pavement."

Here follows specifications for a binder course of bituminous concrete one and one-half inches thick, composed of clean broken stone, to be laid upon the hydraulic concrete base, and upon this foundation "there shall be placed an asphalt wearing surface no less than one and one-half inches in thickness when thoroughly compressed, which shall be manufactured and made strictly in accordance with the formula accompanying the proposal."

The work was performed according to the specifications of the contract and accepted by the city.

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Section 5681, Revised Statutes, provides that the cost of repairing and keeping in repair the paving of all streets and avenues shall be paid out of the general revenue of the city, etc. The defendant's contention is that the work ordered and done by the plaintiff was only that of repairing the pavement of the street, and that therefore the cost of making it was payable out of the general revenue of the city and not chargeable against the property abutting on the improved part of the street. The defendants asked and the court gave an instruction which declared that if the work done under the contract was repairs to the street improved then the finding should be for them. The case was submitted on the defendant's theory of it. There can be no complaint of the action of the court on that score.

The court from the evidence found the fact to be that the work done under the contract was not repairs and gave judgment accordingly for plaintiff. As the court accorded to the defendants a consideration of the case on their theory, but only found against them because the facts which the evidence conduced to prove did not sustain that theory, there was little or nothing left of which they could or can complain. The vital issue of fact tendered by the second special plea of the answer was by that declaration submitted and passed upon adversely to the defendants. We are unable to discover that the finding of fact by the court was contrary to the evidence or unauthorized by it. Neither of the special defenses pleaded in the answer were sustained by the evidence and it results that the plaintiff's prima facie case as established by the recitals in the taxbills was not rebutted. The argument presented in the latter part of defendant's brief is made to support the theory of the case embodied in the declaration of law to which we have just referred and as they succeeded in prevailing on the trial court at the trial to consider the case on that theory no further notice need be here taken of that.

Defendants have called our attention to no other

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adverse ruling of the court that was prejudicial to them on the merits.

It therefore results that the judgment must be affirmed. All concur.

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## NELLIE CAMPBELL, Respondent, v. THE CITY OF STANBERRY, Appellant.

Kansas City Court of Appeals, December 7, 1903, and February 1, 1904.

1. **MUNICIPAL CORPORATIONS: Negligence: Safe Street.** A municipality is liable for negligence in not keeping its streets in a reasonably fit condition for use by the public.

2. ———: ———: ———: **Evidence.** The evidence is held sufficient to send the case to the jury and insufficient to authorize a peremptory instruction on the ground of contributory negligence. Holding v. St. Joseph, 92 Mo. App. 143, distinguished.

3. ———: ———: ———: **Instructions.** The alleged negligence was a failure to guard and light an excavation in the street. The evidence showed neither precaution, and the instruction used the copulative "and" in the place of the disjunctive "or." *Held*, not prejudicial error, as the court on the evidence could well assume that the excavation was neither guarded nor lighted, and the jury could not be misled.

4. ———: ———: ———: ———. Under the pleadings had it been shown that the excavation was protected by some other means than a guard or a light it would have constituted a defense, but there was no such evidence and the instruction properly confined the attention of the jury to the negligence specified in the petition.

5. ———: ———: ———: ———. A city is not bound to keep its streets absolutely safe, but an instruction using the word "safe" without qualification is held not prejudicial in this case, when taken in connection with other instructions.

6. ———: ———: ———: ———. The fact that a party may have learned that there was an excavation in the street will not defeat his recovery for an injury received because thereof, but only requires that he exercise ordinary prudence.

7. ———: ———: **Measure of Damages: Instructions.** An instruction authorizing a recovery for medicine and medical attention is fully warranted on the facts in this record.

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8. ———: ———: ———: **Accident: Instruction.** An instruction that if plaintiff received his injury by reason of an accident on his part he could not recover, is properly refused since it eliminated defendant's negligence and left the case to stand as if the injury had been self-inflicted; besides, the instruction was condemned on a former appeal.

9. ———: ———: **Evidence: Admission of Plaintiff: Instruction.** An instruction that the jury might take into consideration all statements made by plaintiff and the law presumed all statements against interest to be true but those in his own favor the jury might believe or disbelieve according as it found the facts, is properly refused as the admissions are extrajudicial and can be received only with great caution.

Appeal from Gentry Circuit Court.—*Hon. Gallatin Craig,* Judge.

AFFIRMED.

*Aleshire & Benson* for appellant.

(1) The court erred in giving plaintiff's instruction No. 1. First, because it is a comment on the evidence; second because it submits to the jury the question of negligence based solely upon the theory that the jury could find negligence on the part of defendant if it failed to protect the street by guard rails and by placing lights along the streets. It was for the jury to determine whether there was negligence on the part of the city in failing to properly protect the ditch. Barr v. City of Kansas, 105 Mo. 550; St. L., K. & N. W. v.N. S. Y., 120 Mo. 541; Meyer v. Railroad,, 40 Mo. 151; Raysdon v. Trumbe, 52 Mo. 35. (2) This instruction is subject to the same criticism as was found in instruction No. 1, in the former trial of this case. 85 Mo. App. 159. (3) In a case where the defense is contributory negligence it is held error for the plaintiff to submit a case without a recognition of the plaintiff's contributory negligence. Gilson v. Railway, 76 Mo. 282; Moberly v. Railway, 98 Mo. 183; Cultivator Co. v. Railway, 64 Mo. App. 305; Mallman v. Harris Bros., 65 Mo. App. 127. (4) The court erred in giving plaintiff's second

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instruction because if plaintiff was aware of the condition of the street and ditch greater care was required of her than in the case where she had no such knowledge. See authorities, supra. (5) The court erred in giving plaintiff's instruction No. 3 and especially that portion of it which authorized the jury to take into consideration the plaintiff's expense for medicine and medical attention. Muth v. Railroad, 87 Mo. App. 422. (6) The court erred in refusing defendant's instruction No. 9. An instruction of this kind has been heretofore more than once approved. Henry v. Railway, 113 Mo. 525; Sawyer v. Railroad, 37 Mo. 362; Feary v. Railroad, 62 S. W. 458. (7) The court erred in refusing defendant's instruction No. 10 for the reason that if plaintiff knew that the ditch in question was open she should have been required under those circumstances to have used ordinary care and prudence as stated in said instruction. Cohn v. City of Kansas, 108 Mo. 387; Flynn v. City of Neosho, 114 Mo. 572; Maus v. Springfield, 101 Mo. 613; Haniford v. Kansas City, 103 Mo. 172; Gerdes v. Iron F. Co., 124 Mo. 347. (8) The court erred in refusing to give defendant's instruction No. 11. A similar instruction to this has been repeatedly approved in criminal cases as well as civil, and has been the law of this State for years. State v. Brooks, 99 Mo. 137. Shirts v. Overjohn, 60 Mo. 308; Wright v. Town of Butler, 64 Mo. 165; Feary v. Street Railway, 62 S. W. 460.

*Peery & Lyons, J. L. McCullough* and *J. C. Wilson* for respondent.

(1) The first instruction for the plaintiff is not subject to the objections urged against it. Feary v. Railway, 62 S. W. 458; Barr v. Kansas City, 105 Mo. 555; s. c., 121 Mo. 33; Campbell v. Stanberry, 85 Mo. App. 159; Lane v. Railway, 132 Mo. 4; Milligan v. Railroad, 79 Mo. App. 396; Plummer v. Milan, 79 Mo. App. 393; Chilton v. St. Joseph, 143 Mo. 193; Young v. Webb

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City, 150 Mo. 333; Hughes v. Railway, 127 Mo. 452; Crecellus v. Bierman, 68 Mo. App. 34; Dowling v. Allen, 102 Mo. 213; Bealey v. Smith, 158 Mo. 515; Brummel v. Harris, 162 Mo. 403. (2) The second instruction for the plaintiff was approved on the former appeal. (See authorities cited at end of last point.) Besides this instruction clearly and accurately stated the low under the decisions in this State. Graney v. St. Louis, 141 Mo. 185; Chilton v. St. Joseph, 143 Mo. 202. (3) Appellant attacks plaintiff's third instruction on the ground that the evidence was not sufficient to entitle plaintiff to recover for medicine, medical attendance, etc. It showed an actual payment of $97 and an absolute liability testified to by plaintiff of $400 more. What more could be required. Morris v. Railway, 144 Mo. 500; Robertson v. Railway, 152 Mo. 382. (4) It is contended that the court erred in refusing defendant's instruction No. 9. It is settled by a long line of decisions in this State that when the injury, loss or damage complained of is a joint result of the negligence of the city, and unavoidable accident, the defendant is liable for the entire damage or loss, if the plaintiff is guilty of contributory negligence. Vogel v. West Plains, 73 Mo. App. 588; Vogelgesang v. St. Louis, 139 Mo. 127, and cases therein cited. Beauvais v. St. Louis, 169 Mo. 500. The defendant again as upon the former appeal complains of the refusal of its instruction No. 10 which is identical with its No. 11 offered on the former trial. The observations made in the preceding paragraph apply with equal force to this objection. See authorities cited at conclusion of paragraph 2 of this brief. Besides, this instruction was a direct comment on the evidence; a singling out of one fact, which even if true did not preclude a recovery, and telling the jury to take it into consideration in determining a vital issue in the case. That this can not be done is established by cases too numerous to cite. Everything contained in this instruction as to the

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knowledge of the plaintiff, and the care and prudence required in case of such knowledge, in so far as those matters were proper to be stated to the jury, was fully stated in other instructions both for plaintiff and defendant. In fact defendant's fifth instruction given seems to contain everything embodied in its No. 10. So that in no view of the matter could the refusal of the latter have been error. (6) It is next contended that the court erred in refusing defendant's instruction numbered 11. The authorities upon evidence make a broad distinction between solemn admissions in the course of judicial proceedings and admissions against interest made otherwise. It frequently happens also, that the witness, by unintentionally altering a few of the expressions really used gives an effect to the statement completely at variance with what the party actually did say. 1 Greenleaf, Ev., sec. 200. See also, Holmes v. Leadbetter, 69 S. W. 24; State v. Moxley, 102 Mo. 390; State v. Glahn, 97 Mo. 679; State v. Howell, 117 Mo. 325 and other cases; State v. Wisdom, 119 Mo. 552 and cases cited; State v. Inks, 135 Mo. 689; Shoe Co. v. Hilig, 70 Mo. App. 301; Linn v. Bridge Co., 78 Mo. App. 111; Connor v. Ins. Co., 78 Mo. App. 131; Schnieder G. Co. v. Fink Co., 78 Mo. App. 622; Orcheln v. Scott, 79 Mo. App. 534; Fullerton v. Fordyce, 121 Mo. 13; Freeman v. Railway, 95 Mo. App. 314.

SMITH, P. J.—This is an action which was brought by plaintiff against defendant, a city of the fourth class, to recover damages for injuries occasioned by negligence. The evidence tends to prove that at the time of the injury the defendant was putting in a system of waterworks and had dug a ditch along Sixth street in front of the grounds of the Normal school where plaintiff was then working, and had left it open and without guard rails or lights for about one month; that opposite the entrance of the Normal grounds a narrow path or passway had been left where the ground was unbroken;

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that on the night in question, which was very dark, the plaintiff attempted to cross the street south of said grounds, to visit friends living on that side of the street and fell into the ditch and was rendered unconscious and lay there for perhaps an hour when she was discovered by a stranger passing, who rescued her; that at that time she was a strong, healthy young woman of 26, and had never had any serious illness; and that as a result of the injuries received under the circumstances aforesaid, her health was completely wrecked, so that for years she had been unable to work, and for more than six years before the trial had been continuously under the care of a doctor, and much of the time in the hospital.

There was a trial which resulted in a judgment for plaintiff and defendant appealed. The defendant assails the judgment on a great number of grounds, the first of which being that the petition does not state facts sufficient to constitute a cause of action, or if so, that the evidence is insufficient to support it.

By the common law of England, as it is interpreted in the English courts, by the Supreme Court of the United States, and by the highest courts of most of the States, an action on the case for negligence can always be brought against a chartered municipality for neglect to keep the streets over which it had control in a reasonably fit condition for use by any number of the public for any purpose for which a public street is designed. Jones on Neg. Munic. Corp., sec. 72; Ball v. Independence, 41 Mo. App. 475.

The evidence as presented by the abstract in the present case is not materially variant from that brought before us by the former appeal—85 Mo. App. 159—where, after an examination of it, we concluded it was ample to entitle the plaintiff to a submission to the jury; and we are unable now to discern any reason why we should depart from that conclusion. Besides this the abstract now before us does not purport to contain all

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the evidence adduced at the trial, and for that reason we do not feel at liberty to examine it for the purpose of determining whether or not the evidence was sufficient to make out for plaintiff a prima facie case. Nor do we think this to be a case where the undisputed facts were such that reasonable minds could draw no other conclusion from them than that the plaintiff was guilty of contributory negligence and that therefore the question of negligence was one for the court. Fowler v. Randall, 73 S. W. 931; Meyers v. Railway, 103 Mo. App. 268; Nothing is seen in Holding v. St. Joseph, 92 Mo. App. 143, that requires us to overthrow the judgment in this case. The evidence here shows that plaintiff attempted to pass over the street on a crossing that had been in constant use by the public for many years and in doing so she fell into an unguarded and unlighted excavation and was there hurt; while the facts in that—the Holding case—as may be seen by reference to it, were essentially different.

The defendant objects that the first instruction given for the plaintiff was erroneous in that it imposed upon it—defendant—the performance of the double duty to maintain along the sides of the street excavation a guard rail or barricade, and also to place lights along the same in such manner as to light the crossing over the same. Possibly this instruction is subject to the criticism of being needlessly verbose, but beyond that we do not think it faulty. It in substance told the jury that it was the duty of the defendant to keep its streets in a reasonably safe condition so that those having occasion to use them could do so in safety. It further told it—the jury—that it was the duty of the defendant to keep Sixth street in a reasonably safe condition at the point covered by the excavation in question and if it found that the defendant neglected to provide guard rails for said excavation at said street crossing and neglected to light the same by night and that in consequence of which the said street

at said crossing was rendered unsafe for persons attempting to cross it in the nighttime, etc., it should find for plaintiff. The uncontradicted evidence showed that the defendant had taken neither of these precautions. Whether defendant had taken one or both was not an issue of fact in the case. If it had taken one of them and the jury had been told that it was required to take both there would have been some substantial ground for complaint. The court in instructing the jury might, without any breach of propriety, have well assumed that the excavation in the street in front of the Normal school building at the time of the plaintiff's injury was neither guarded nor lighted. Even if it be conceded that the instruction was clumsily and inartistically worded, yet, in view of the evidence, it could not have misled the jury to the prejudice of the defendant.

The defendant suggests that it was error for the court to instruct the jury that if the excavation was unguarded and unlighted that the defendant was guilty of negligence because such excavation might have been protected in other ways. It is a sufficient answer to this to say that the fact is clearly inferable from all the evidence that the excavation was wholly unprotected in any way. The instruction in submitting the issue of negligence was as broad as the allegation of the petition and that was all that was required. If the excavation was protected in some other way that no doubt would have constituted a defense; but if so, there was no evidence offered tending to prove it. The court very properly by the instruction confined the attention of the jury to the negligence specified in the petition.

The defendant further questions this instruction on the ground that it declared it to be its duty without qualification to keep its streets absolutely safe without regard to any degree of safety or unsafety. This results no doubt from a misconception of the language employed in it. It first declared that it was the duty of the defendant to keep Sixth street in a reasonably safe con-

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dition at the place covered by the excavation. This declaration was followed by the information that if it found that defendant left such excavation open and unguarded and unlighted at the place where the injury happened whereby it became unsafe and dangerous to persons attempting to cross it in the nighttime, etc., that this was a breach of defendant's duty. The instruction considered in its entirety we think left it to the jury to find whether or not the street at the place of injury was kept in a reasonably safe condition. The instruction did not declare it to be the duty of the defendant to keep its streets safe or absolutely safe, but that the duty imposed was to keep it reasonably safe. The qualification was not therefore wanting. And finally, the defendant contends that this instruction does not submit the defense of contributory negligence. It is submitted in a number of defendant's instructions and this is sufficient. Hughes v. Railroad, 127 Mo. l. c. 452.

The second instruction given for plaintiff told the jury that *plaintiff, "had the right in crossing the street to assume that the same was in a safe condition, unless she knew or had reason to suppose that it was unsafe.* And although plaintiff may have known, or have been previously informed that said ditch had been dug along the north side of Sixth street, south of the Normal grounds, yet that fact alone would not prevent her from recovering in this action; but in that case she would be required to use the care and caution which a person of ordinary prudence, knowing such fact, would exercise under similar circumstances." The defendant contends that the words "safe condition" contained in the *italicized* part thereof should have been preceded with the qualifying word, *"reasonable."* If the court in its instruction number one given for plaintiff had not told the jury that the defendant was only required to keep its streets in a reasonably safe condition for travel, and in its number two for defendant that it was not an

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insurer against accidents on its walks or streets, nor was it liable for every defect therein, then perhaps it would have ground for complaint. King v. King, 155 Mo. l. c. 423. Beside, in its present form it meets the view expressed by us when disposing of the objections there urged to it on the former appeal, and it is not therefore open to further criticism.

The plaintiff's third telling the jury that in determining the measure of damages it might take into consideration the necessary expenses for medicine and medical attention, was fully warranted by the evidence which tended to prove that she had been under the care of a physician receiving daily and weekly treatment for about six years, much of that time she had been in a hospital and had paid on that account $97 and still owed $400 more. This was sufficient. Morris v. Railway, 144 Mo. 500; Robertson v. Railway, 152 Mo. 382.

The defendant's ninth, which was refused, was to the effect that, "if the injuries received by plaintiff were merely the result of an accident upon her part" there could be no recovery. Under this instruction even if the defendant was guilty of negligence, and but for which the accident on plaintiff's part would not have happened, or, if the injury was the joint result of defendant's negligence and an unavoidable accident on plaintiff's part, there could have been no recovery, even though plaintiff was guilty of no contributory negligence. It was not therefore a correct expression of the law in a case of this kind. Vogelgesang v. St. Louis, 139 Mo. 127; Voegel v. West Plains, 73 Mo. App. 588. By it the negligence of the defendant which the evidence tended to prove was eliminated and the case was left to stand as if the injury had been self inflicted. Such an instruction if applicable in any case was wholly inapplicable where the facts are as in this. Beauvais v. St. Louis, 169 Mo. 500. When the cause was here on the former appeal we declined to condemn the action of



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the court in refusing this same instruction and that ruling must be regarded as conclusive. And the same remark is alike applicable to the defendant's ninth, which is identical with its tenth of its series when the case was here before.

The defendant's eleventh, which was refused, in substance told the jury that it might take into consideration all the statements made by plaintiff and to different witnesses and that the law presumed all statements made against her own interest to be true because made by her, but what she may have stated to her own interest it—the jury—might believe or disbelieve accordingly as it might think from all the facts and circumstances detailed in the evidence were entitled to credit. The admissions to which this instruction referred were extrajudicial. Those to which the instructions in Feary v. Railroad, 62 S. W. 460, and in State v. Brooks, 99 Mo. 137, were judicial. There is a well recognized distinction between the two. The personal admissions of a defendant when made in his own cause in the presence of his counsel under our statute permitting him to testify are regarded as conclusive upon him for the purposes of the case in which they are made. When the admission is verbal and extrajudicial it ought to be received with great caution. The evidence consisting as it does in the mere repetition of oral statements, is subject to much imperfection and mistake, the party himself either being misinformed or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens also that the witness by unintentionally altering a few expressions really used gives an effect to the statement completely at variance with what the party actually did say. 1 Greenleaf on Evidence, sec. 200; Holmes v. Leadbetter, 69 S. W. l. c. 24; Feary v. Railway, 62 S. W. l. c. 460. It is thus seen that the conclusive effect which is given to judicial admissions can not be given to those that are *extrajudicial.* Such an instruction as this could not

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be given in a criminal case without error. State v. Wisdom, 119 Mo. l. c. 552; State v. Howell, 117 Mo. l. c. 323; State v. Ink, 135 Mo. l. c. 689. And even though an instruction declaring what effect should be given to extrajudicial admissions like that given in State v. Wisdom, supra, be proper in a civil case, that here under review it is seen falls far short of the mark. It is obvious that it assumes a controverted fact; namely, that plaintiff made admissions to other witnesses against her interests. This was a question for the jury and not for the court, and for that reason, if for no other, it was properly refused.

Much space in the briefs of counsel is devoted to the discussion of the various rulings of the court made in respect to the admission and exclusion of evidence. The grounds of objection to these we have examined and have concluded the same were not well taken. We can not discover that a different ruling would have altered the result or that the defendant in consequence thereof was prejudiced on the merits.

It results that the judgment must be affirmed. All concur.

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## W. J. PHIPPS et al., Respondents, v. MALLORY COMMISSION COMPANY, Appellant.

**Kansas City Court of Appeals, February 1, 1904.**

1. **PRINCIPAL AND AGENT: Fraud: Liability.** The principal need not authorize the agent to practice a fraud on a third party, yet, if he authorizes his agent to transact business with a customer and in so doing the agent practices the fraud on the customer the principal is liable.

2. ———: ———: **Extent of Authority.** If the customer knows the agent's authority is in writing he should look to the writing to ascertain its extent; but where the principal represents to him that the agent has certain authority the customer is not bound by the writing.

Appeal from Jackson Circuit Court.—*Hon. Shannon C. Douglas,* Judge.

AFFIRMED.

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*Eaton & Loomis* for appellant.

(1) Instruction No. 6 given at the request of the plaintiffs is subject to objection. Reinhard on Agency, section 345; Glass v. Rowe, 103 Mo. 513; Mechanics' Bank v. Shaumburg, 38 Mo. 228; State v. Bank, 45 Mo. 528; Fisher v. Chouteau, 10 Mo. App. 579; 1 Am. & Eng. Ency. Law (2 Ed.), p. 987; Bank v. Amer, 3 Hill (N. Y.) 262; Casey v. Donovan, 65 Mo. App. 521; Chapman v. Currie, 51 Mo. App. 40; Harkness & Russell v. Briscoe, 47 Mo. App. 196; Newland Hotel Co. v. Furniture Co., 73 Mo. App. 135; Harrison v. Railroad, 50 Mo. App. 332; Reinhard on Agency, sec. 392; Blow v. Spear, 43 Mo. 496; Bicking v. Stevens, 69 Mo. App. 168. (2) Instructions No. 5 as well as No. 6, given at the request of the plaintiffs, are a departure from the cause of action alleged and stated in the petition. Woods v. Campbell, 110 Mo. 572; Brown v. Railroad, 101 Mo. 484; Edwards v. Railroad, 79 Mo. App. 257; Chitty v. Railroad, 148 Mo. 64; James v. Hicks, 76 Mo. App. 108; Ragan v. Railroad, 144 Mo. 623. (3) Instructions 7 and 8 are intended to bind the defendant, even if the agent traveled entirely outside of his authority and waived commissions which the defendant would have been entitled to receive had the agent, Walker, been acting in their behalf. (4) The defendant's demurrer to the evidence and the defendant's instruction No. 15, in the nature of a demurrer to the evidence offered at the close of all of the testimony, should have been given.

*Boyle, Guthrie, Hurt & Davison* for respondents.

(1) Where the corporation undertakes, through its managing officers, to perform a duty, and selects an individual to whom is delegated the performance thereof, such individual is, for the purpose, the corporation itself, and has authority in everything pertaining

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to the execution of the trust undertaken. State ex rel. v. Railroad, 104 Mo. 104; State ex rel. v. Insurance, 152 Mo. 1; Jones v. Williams, 139 Mo. 1; Perkins v. Railroad, 55 Mo. 201; Chase v. Rusk, 90 Mo. App. 25; Green v. Worman, 83 Mo. App. 568; Insurance v. Owens, 81 Mo. App. 201; Exeter v. Sawyer, 146 Mo. 302; Marshal v. Ferguson, 78 Mo. App. 645; Brick Co. v. Hogsett, 94 Mo. App. 175; Marshall v. Ferguson, 101 Mo. App. 655; Williams v. Railroad, 153 Mo. 487; Fulkerson v. Lynn, 64 Mo. App. 649; Gro. Co. v. Nolin, 83 Mo. App. 73; Cornwall v. Gansen, 85 Mo. App. 678; Ratcliffe v. Lumpee, 82 Mo. App. 335; Morrison v. Sohn, 90 Mo. App. 76; White v. Gilleland, 93 Mo. App. 310; Fisher Co. v. Staed Co., 159 Mo. 362; Sawyer v. Railroad, 156 Mo. 468; Choquette v. Railroad, 152 Mo. 257; Mellor v. Railroad, 105 Mo. 455; Lathrop v. Mayer, 86 Mo. App. 355.

ELLISON, J.—This action arises on account of certain fraudulent conduct charged against defendant's agent in selling to plaintiffs a lot of cattle whereby defendant received from plaintiffs $494.50 more than they should have, and more than they would have, had the transaction been fairly conducted by such agent. The judgment in the trial court was for the plaintiffs.

Since the verdict was for plaintiffs we will state the facts substantially as the evidence in their behalf tends to show. It appears that plaintiffs were in Kansas City where defendants do business as live stock commission merchants. That they applied to defendant for a lot of cattle of certain named description. That defendant advised them there was nothing suitable in market, that the market was high in Kansas City at that time, and that they could do better if they would buy through its agent (Walker) in Oklahoma. That defendant notified Walker by letter of plaintiffs' wants, and that he put himself in communication with plaintiffs, and informed them that he knew of a lot of

cattle which would suit them and that they could be had of the owner (a man named Denmark) at a certain price aggregating $4,664. Following this information, he brought plaintiffs and the man whom he represented to be the owner of the cattle together when they (including the agent) looked them over. Plaintiffs complained to Walker that the price was too high, but he repeatedly assured them that it was the least money with which the purchase could be made. That he had tried Denmark in every way for a less price and was refused; but that the cattle were really cheap enough and that the price offered was the very best he knew of in that country. Plaintiffs finally bought the cattle, giving defendant their note and mortgage for the purchase price aforesaid.

In truth, Walker had at this time already purchased the cattle of Denmark, and when he was making these representations to plaintiffs and pretending that he was, as defendants' agent, looking out for plaintiffs' interest and doing the best he could for them with Denmark, he had the cattle bought at the price of $4,169.50. In order to make sure of obtaining the advance price, he colluded with Denmark, of whom he had bought them, that he (Denmark) should pretend to plaintiffs that he was yet the owner and that he, Walker, should not be "known in the deal at all." In this manner plaintiffs were induced to buy at the advanced price, as has just been stated. Plaintiffs paid their note and mortgage and afterwards discovered the fraud as herein set out. They thereupon brought this suit.

It is not claimed that defendant's managing officers knew of or authorized the fraud practiced upon plaintiffs and the sole ground relied upon to charge defendant is its responsibility for the acts of its agent. The trial court was fully as liberal as could be asked in the range of testimony in behalf of defendant and in the instructions given at its instance.

The argument advanced here to defeat the judg-

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ment rendered covers much more in hypothesis than defendant's case justifies. The only proper contest between the parties was whether defendant informed plaintiff that Walker was its agent in Oklahoma who would buy, or assist them in buying, the cattle which plaintiffs were seeking. And whether Walker thereafter opened communication with plaintiffs by informing them that he had found cattle belonging to Denmark which were what they wanted; and thereafter selling the cattle, or inducing plaintiffs to buy the cattle in the fraudulent manner above stated. It does not make the slightest difference in defendant's liability that it never authorized its agent to practice the fraud. If it authorized him (or, if it had not given such authority, if it told plaintiffs he had authority) to purchase, or assist in purchasing, the cattle which plaintiffs were looking for, then it is responsible for the fraudulent conduct of the agent in and about that business.

It seems that when plaintiffs were in Kansas City defendant's manager told them that he would write to its agent about plaintiffs desiring to purchase the cattle. There was one letter of that nature shown in evidence which tended to show that the agent was merely to inspect any cattle plaintiffs might themselves buy and see if they were such as that defendant could safely loan the purchase price to plaintiffs taking a chattel mortgage on them therefor. But it is of no consequence how narrowly defendant may have restricted its agent's authority, if it, in point of fact, represented to plaintiffs that he had the wider authority.

Nor are we able to understand how it could help defendant if it should be conceded that Walker had bought the cattle of Denmark on his own account prior to the time he first learned that plaintiffs wanted to buy, and that therefore he could not have bought of Denmark with the view and purpose of selling to plaintiffs at an advance. Indeed, we can not discover anything in defendant's entire statement made in this

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court which, in any manner, exculpates it, if it made the representations of Walker's agency and he thereafter defrauded plaintiffs in the manner shown.

We discover no substantial error in the action of the court on the instructions. Number two, for defendant, was much more than it should have asked. Although when one dealing with an agent knows that such agent's authority has been committed to writing by the principal, one ought to seek the writing and ascertain the extent of the authority, yet if the principal, himself, informs such person what that authority is, he may safely rely upon it, as against such principal, without looking to see whether he had been told the truth.

We have gone over the brief and argument made in behalf of defendant and found nothing which would justify us in overturning the judgment. If the evidence in plaintiffs' behalf is to be believed, it was manifestly for the right party and it is therefore affirmed. All concur.

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O. G. BYERS et al., Appellants, v. C. E. WEEKS, Respondent.

**Kansas City Court of Appeals, February 1, 1904.**

1. **ADMINISTRATION: Discharge: Administrator De Bonis Non.** When an administrator has fully administered an estate and been discharged whether upon the discovery of additional assets, an administrator *dc bonis non* may be appointed, *quaere.*

2. ———: **Partnership Estate: Administrator: Statute.** Under the statute a partnership estate can only be administered by the surviving partner or the administrator of the deceased partner.

3. ———: **Descent of Personal Property: Title: Heir: Action.** The rule that personal property descends to the administrator is an invention for the convenience and benefit of creditors and his title is only a qualified one, the heir at all times having

an equity in such property, and when the administrator fails to administer on the partnership estate and is discharged the heir may maintain an action in equity therefor.

4. **EQUITY: Adequate Remedy: Action.** When there is no adequate remedy at law in the very nature of things equity affords a remedy.

Appeal from Jasper Circuit Court.—*Hon. J. D. Perkins,* Judge.

Reversed and remanded.

*Shannon & Shannon, Thomas & Hackney* for appellants.

(1) The facts stated in the petition exclude all the contingencies under which an administrator *de bonis non* may be appointed, and, therefore such an administrator can not be appointed. R. S. 1899, sec. 46; Graystone v. Weddell, 63 Mo. 539. (2) The petition affirmatively showing that the administrator of the individual estate never brought the partnership estate into his administration, it follows that no bond for that purpose was even given by him as required by law. Plaintiffs therefore had no legal redress by suit upon such bond. Rev. Stat. 1899, sec. 61; Howell v. Jessup, 104 Mo. 453. (3) Heirs of deceased partners may sue the surviving partner in such cases as shown by the petition herein. 15 Enc. Pleading and Practice, p. 1072; Goebel v. Foster, 8 Mo. App. 443; Ravenscroft v. Pratt, 22 Kans. 20; Valentine v. Wyser, 123 Ind. 47; Rosenweig v. Thompson, 66 Md. 593; Blake v. Barnes. 63 Hun (N. Y.) 633; s. c., 18 N. Y. Sup. 471; Hyer v. Burdett, 1 Edw. Ch. (N. Y.) 325; Travis v. Milne, 9 Hare 141; Stainton v. Carron Co., 18 Beav. 157; Seeley v. Boehm, 2 Madd. 176; Newland v. Champion, 1 Ves. 105; Davies v. Davies, 2 Keen 534; Hutton v. Laws, 55 Iowa 710; Harrison v. Righter, 11 N. J. Eq. 389.

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*H. W. Curry*, with whom is *Howard Gray*, for respondent.

(1) It is the established law of this State that on the death of the owner, personal property descends to his or her personal representative, and the title to real estate vests in the heir. The heir can receive his distributive share of the personalty of his ancestor only through the channels of administration. Adey v. Adey, 58 Mo. App. 408; McMillan v. Wacker, 57 Mo. App. 220; 1 Woerner, American Law of Administration (2 Ed.), star sec. 431, sec. 200, p. 460. (2) The partnership estate was a separate and distinct estate; it could not be administered with, or as part of the individual estate of J. H. Byers, and there has never been any impediments in the way of administering the same. Orrick v. Aahey, 49 Mo. 428; Matney v. Gregg Bros., 19 Mo. App. 107; State ex rel. Richardson v. Withrow, 141 Mo. 69. (3) On a showing that the estate of J. H. Byers has closed, and the administrator discharged, and, that there are unadministered assets the probate court would have jurisdiction to appoint an administrator *de bonis non* on the estate of J. H. Byers. Howell v. Jump, 140 Mo. 441; Scott v. Crew, 72 Mo. 261; Rogers v. Johnson, 125 Mo. 202; Francisco v. Wingfield, 161 Mo. 542.

BROADDUS, J.—The petition is in equity by the heirs at law of J. H. Byers, deceased, against defendant alleging that said deceased and defendant were partners during the lifetime of the former engaged in the mercantile business; that on the death of Byers an administrator was appointed who duly administered his estate, made final settlement, was discharged from his trust as such, and the debts of the intestate were paid; that said administrator was prevented from taking charge of the partnership estate by the representations

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of defendant that the partnership had been dissolved previous to the death of said Byers after a complete and final settlement, and that he had paid him his full share of said partnership; that said representations were untrue and made to defraud said administrator and the plaintiffs; and that in fact there never had been an accounting, as stated, during the lifetime of said Byers, and no dissolution of the said partnership. Plaintiffs state that the accounts of said partnership are voluminous and complicated, and asks for a decree of accounting and settlement of the partnership. To the petition the defendant interposed a demurrer which the court sustained, and plaintiffs refusing to further plead, judgment was rendered against them and they appealed.

The question presented is, whether the heirs at law of the deceased can maintain this action? As a rule, "the title to personal property passes to the administrator or executor, and he only can sue for the property on an injury thereto." Smith v. Denny, 37 Mo. 20. "On the death of the owner personal property descends to his legal representative, though he leaves no debts and the claimant is his sole distributee." Adey v. Adey, 58 Mo. App. 408. "Personal property passes to the administrator, and he alone, and not the heir, has a right to the possession thereof, and can alone sue therefor, unless the probate court dispenses with any administration." McMillan v. Wacker, 57 Mo. App. 220.

The contention of the plaintiffs is, that the facts stated in the petition exclude every contingency under which an administrator *de bonis non* may be appointed. Section 46, Revised Statutes 1899, only provides for administrators *de bonis non* where executors or administrators of an estate die, resign, or their letters are revoked. Said section is silent in regard to a case of final settlement and discharge. See Grayson v. Weddell, 63 Mo. 523. Section 61, *idem,* provides that

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on the death of one partner the surviving partner shall, within thirty days after the granting of letters on the estate of the deceased partner, give the bond required of him as administrator of the partnership estate, and in case he neglects or refuses to do so, the executor or administrator of the deceased partner shall, by complying with the provisions of the section, administer the partnership estate. It is argued, that as there is no statutory authority, under the facts stated in the petition, for the appointment of an administrator *de bonis non* of the estate of the deceased, there is no way in which the partnership estate can be administered, therefore the remedy alone is by resort to a court of equity in the name of the heirs.

It seems that the statute fails to provide for the administration of a partnership estate except, either by the surviving partner or by the administrator of the surviving partner. The surviving partner having failed to administer the partnership estate and having administered the deceased partner's estate, made final settlement and received his discharge, it seems to us in the absence of authority that the office of such administraton was *functus officio,* and that the defunct was beyond the power of resurrection. But the Supreme Court in Howell v. Jump, 140 Mo. 453, held that under certain circumstances an administrator *de bonis non* could be appointed after final settlement of the administrator. In that case, debts amounting to several hundred dollars had been allowed against the estate, only eighty-nine per cent of which had been paid, and the land which was subject to the widow's dower had not been sold. Held: "These facts gave the court jurisdiction to appoint an administrator *de bonis non.* The appointment was regularly made and can not be attacked in this collateral proceeding." In Rogers v. Johnson, 125 Mo. 202, there had been a final settlement. But the court said: "It must, however, be presumed in the absence of anything being shown to the

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contrary that the estate had not been fully administered and the order appointing J. C. Woody administrator *de bonis non* was legally and properly made."

In the former case the holding rests upon the facts that the debts of the estate were unpaid and of remaining assets unadministered, and because the appointment had been regularly made and could not be attacked collaterally. In the Rogers case, upon the presumption that the estate had not been fully administered and that the appointment could not be attacked collaterally. One holding that the estate had not been wholly administered and the other the presumption that it had not. There can, of course, be no presumption in this case for the demurrer admits that all the debts have been paid; that no administrator *de bonis non* has been appointed; and that there is personal property of the deceased in defendant's hands which he has not accounted for. And it may be true that if the probate court at this late day should appoint such an administrator, its action would be upheld if attacked in a collateral proceeding, yet we are confident that it could not be sustained in a direct attack on appeal from such order. And it may even be conceded that when there are no debts owing by the deceased that an administrator should be appointed in the first place to collect the assets and distribute them to the heirs at law. But it does not necessarily follow that in no event can the heirs at law sue to recover the personal estate of their ancestor.

If the defendant has an unsettled partnership estate in his hands which he has failed to administer and for which he has failed to account, and which the deceased partner's administrator failed to administer while in office, and there being no authority to appoint an administrator *de bonis non,* the plaintiffs have the right to sue in their own name as heirs at law. The rule that personalty descends to the administrator is but a fiction of law invented for convenience and the

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benefit of creditors. His title is not absolute, it is a qualified one. He holds as trustee merely for creditors and distributees. And when the debts of the estate are paid, the residue by law descends to the heir at law. The heir at all times has an equity in such property subject to the trust title of the administrator. In Harrison v. Righter, 11 N. J. Eq. 389, it was held that notwithstanding the general rule that an heir at law could not compel the surviving partner of an estate to account, yet under certain circumstances he might do so. See also, Bowsher v. Watkins, 1 Russ. & M. 277; and Holland v. Prior, 1 Mylne & Keene, 237. We have not sought to find a case strictly parallel with this, and if we had, perhaps, the search would have been in vain. But the principle is clear enough that when no legal remedy exists, equity will afford one in the interest of justice. There being no legal remedy in the very nature of things equity affords a remedy.

Reversed and remanded. All concur.

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## HIRAM ROBBINS, Respondent, v. THE BIG CIRCLE MINING COMPANY, Appellant.

Kansas City Court of Appeals, February 1, 1904.

1. **MASTER AND SERVANT: Negligence: Usual Course: Evidence.** No inference of negligence can arise from evidence which shows that the instrument used was such as is ordinarily used for like purpose by persons in the same business; but this rule can not apply to the evidence in this case since the hammer complained of is not shown to be in general use by miners in the same business, but rather that such defective hammer though frequently used, constituted an exception to the general custom.

2. **———: ———: Assumption of Risk: Safe Appliances.** While the servant assumes the ordinary risk incident to the business the master is still bound to furnish the servant with reasonably safe instrumentalities to do his work; and the servant is not

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obliged to refuse to use the appliances if he reasonably believes he can safely use them by the exercise of proper care, and if he does use them, exercising such care, he does not waive his right to compensation for injury.

3. ——: ——: Safe Appliances: Issue. On the trial of the question of negligence in furnishing a certain hammer to be used in breaking rock and mineral the question is not what would be a safe hammer nor whether the hammer was unsafe because of long use, but whether from long use it had become unfit to be longer used with the exercise of reasonable care and caution; and the defendant is held to have known the condition of the hammer and the question for the jury was whether upon the evidence it was reasonably safe to be used with the exercise of due care.

Appeal from Jasper Circuit Court.—*Hon. J. D. Perkins,* Judge.

AFFIRMED.

*W. R. Robertson* for appellant.

(1) Absolute safety is unattainable, and employers are not insurers. Courts should not set up a standard which will "in effect" dictate the customs or control the business of the community. Minnier v. Railway, 167 Mo. 120; Brown v. L. & L. Co., 65 Mo. App. 165. (2) The rule that it is the duty of the master to inspect appliances is not applicable in this case because it would not have disclosed anything more than the plaintiff was presumed, on account of his age and experience, to know about it. Shea v. Railroad, 76 Mo. App. 33; Herbert v. Mound City B. & S. Co., 90 Mo. App. 316. (3) Plaintiff will not be heard to say that he was ignorant of the condition of this hammer, as he alleged in his petition that the hammer had "broken and splintered edges about the face thereof," and his long experience with machinery and in the mines rendered him as familiar with the dangers, if any, of a hammer presenting this appearance, as his master. Steinhauser v. Spraul, 127 Mo. 562; Rietman v. Stolte,

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120 Ind. 314; Leary v. Railway, 139 Mass. 580; Marsh v. Chickering, 101 N. Y. 396. (4) The testimony in this case disclosed beyond question that there had been a long and successful use of such hammers as plaintiff was using at the time he claims to have been injured, and that such hammers were in general use by all mine operators in the district where he had worked for two years, consequently, there could be no liability on the defendant's behalf, besides the defect which he charges was open and visible to him. Thompson v. Railway, 140 Mo. 138; Railroad v. Harper, 19 N. E. 31. (5) Evidence that newer hammers, or those tempered differently from the one in controversy, would be safer, without proving that such ideal hammers were in common use, would not fix any negligence on the defendant. Berning v. Medart, 56 Mo. App. 449. (6) The defendant had always conducted its business in the manner it was at the time of the accident, and as appears from the testimony all others engaged in the same business had been using boulder hammers as long as they were heavy enough to break rock and no similar accident had occurred from the use of an old hammer within the memory of any witness, therefore, since an infinitely small piece flew from this hammer and hit plaintiff in the eye it can only be designated as an "accident." Wendall v. Railway, 75 S. W. 689.

*Shannon & Shannon*, for respondent, submitted an argument.

BROADDUS, J.—The plaintiff sues to recover damages sustained by the loss of one of his eyes alleged to have been the result of defendant's negligence while he was in its employ.

The evidence tends to show that defendant was engaged in mining at Oronogo, Jasper county, Missouri, and in cleaning and reducing zinc ores for market; that plaintiff in September, 1902, was in the employ of defendant engaged in feeding what is called a crusher, a

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part of said mining plant; that one of plaintiff's duties was to break rock and large pieces of ore before they were put into said crusher, for which purpose he was furnished with a steel hammer; and that while so engaged in breaking a boulder of rock a small piece of the said hammer broke off and projected into his right eye, causing its destruction. There was also evidence tending to show that said hammer was old and worn and had been reduced in weight while in use more than two pounds; that both plaintiff and the defendant's superintendent knew of its condition; and that said superintendent had promised plaintiff to supply its place with a new one, but had failed to do so. The objection plaintiff made to the hammer was that it was too light. The hammer was produced and exhibited to the jury and it appeared that around its face it was broken and slivered and there were indentations where many pieces had broken out of the edge. Frank Gear, a witness for plaintiff, and who was an engineer and blacksmith, testified that, the hammer in question was worn and also that the edges would "break loose and fly."

The general tendency of the testimony on both sides was to the effect that all hammers of the kind in question would wear away and break off in small pieces by use, some more than others. It depending on how they were tempered. Some of the witnesses for defendant testified that they preferred an old worn hammer to a new one. It also appeared that hammers were often used in the business until they were much worn and reduced in weight.

The jury returned a verdict in plaintiff's favor for $500. None of the instructions are preserved in the record and the only question presented by appellant is that the court erred in refusing defendant's demurrer to plaintiff's evidence.

The contention of defendant is, that as it furnished an instrument with which to perform his labor that was



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ordinarily used for like purposes by persons engaged in the same kind of business, it was not liable to the plaintiff for his injury. In Minnier v. Railway, 167 Mo. 120, the rule is stated to be: "No inference of negligence can arise from evidence which shows that the instrument used was such as is ordinarily used for like purposes by persons engaged in the same kind of business." Such is the general rule adopted in this State. But the question does not arise in this case and consequently can have no application. The evidence did not show that the hammer in question was such as was in general use by miners engaged in a like business, nor that such was in general use by the defendants. But it did show, as stated, that hammers much worn were in common use. But the question here was, whether the hammer in controversy had been used to such an extent as to render it most reasonably safe. It would have been impossible to show, and it was not attempted, that such hammers were all in the same condition, brought about by use. The chances were that they would differ in their conditions in that respect by degrees—some more and some less. The testimony was rather to the effect that such defective hammers, though frequently used, constituted an exception to the general custom. And as the defects of each particular hammer must have differed, as stated, in degree from every other one, there did not exist a standard from which a custom could have been inferred.

It is well settled law that, "The servant in entering the service of his master assumes the risks that ordinarily and usually are incident to the business being conducted by the master." But it is also well settled that, the master is bound to furnish his servant with reasonably safe instrumentalities with which to do his work. The contention here is, that the plaintiff knew the defects of the hammer and therefore he is not entitled to recover. But the rule is that "if the servant knows, or by the exercise of ordinary care could know,

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that the appliances furnished are not altogether safe, he is not obliged to refuse to use them or quit the service, if he reasonably believes that by the exercise of proper care and caution he can safely use them, notwithstanding they are not reasonably safe; and if he does use them and exercise such care and caution and is injured, he does not waive his right to compensation for injuries in consequence, nor is he guilty of contributory negligence." Minnier v. Railway, supra. And as it does not appear that the defects were so glaring as to threaten immediate danger, nor of such a character as that a person of ordinary prudence would not have used the implement in question, plaintiff was not precluded from recovery on the ground that he had been guilty of contributory negligence. Booth v. Railway, 76 Mo. App. 516.

The question is, not what would be a safe hammer, but, what would constitute one that was reasonably safe? Nor, whether it would be unsafe because it had been used for a considerable length of time, but, whether from long use it had become unfit to be longer used in the exercise of care and caution? There can be no doubt but what the continued application with great force of a steel hammer upon a hard substance like rock, whether the metal be properly tempered or not, will eventually cause disintegration of the metal. This is a fact well known and defendant must be held to such knowledge. That defendant knew the condition of the hammer in question there can be no doubt, and it therefore became a question for the jury whether under all the evidence it was reasonably safe to be used by the exercise of due care.

Cause affirmed. All concur.

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KANSAS CITY ex rel. ROB'T NEILL et al., Appellants, v. JOHN B. ASKEW, Respondent.

Kansas City Court of Appeals, February 1, 1904.

1. **TAXBILL: Grading: Resolution.** If a published resolution for paving a street does not include a description of the work of bringing the street to grade and the cost of such work is included in the taxbills, the bills are thereby rendered void.

2. ———: **Paving Street: Contract: Substituted Material.** A contract called for crushed river gravel. The gravel used was not crushed. *Held*, the taxbills were void.

3. **TRIAL PRACTICE: Peremptory Instruction: Trial Before the Court: Evidence.** In a trial before the court without a jury the defendant asked an instruction that the plaintiff is not entitled to recover. The plaintiff asked no declaration of law. *Held*, the giving of defendant's instruction did not withdraw from the court a consideration of any of the plaintiff's evidence, and the instruction amounted to a finding on the law and the evidence for defendant.

Appeal from Jackson Circuit Court.—*Hon. J. H. Slover*, Judge.

AFFIRMED.

*Karnes, New & Krauthoff*, for appellants, submitted lengthy argument.

*Warner, Dean, McLeod & Holden* for respondent.

(1) At the close of the evidence, the record shows that the case was submitted to the court upon the request made by the defendant for the court to find and declare that under the law and the evidence, the plaintiff was not entitled to recover. Upon what theory of the law, or upon what view of the facts the trial court proceeded, can not now be ascertained. Such being the

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case, this court and the Supreme Court, have frequently held that there is nothing for review. Ins. Co. v. Stone, 42 Mo. App. 383; Heman v. Gerardi, 96 Mo. App. 231; Riffe v. Railroad, 72 Mo. App. 222; Wheeler v. McDonald, 77 Mo. App. 213; Miller v. Breneke, 83 Mo. 163; Smith v. Dunklin County, 83 Mo. 195; Rice, Stix and Co. v. McClure, 74 Mo. App. 383; Stone v. Spencer, 77 Mo. 356; Sieferer v. St. Louis, 141 Mo. 595; Hubbard v. Fuchs, 164 Mo. 426; Wenzel v. Erath, 48 Mo. App. 476; Sell v. Bretelle, 162 Mo. 373; Warder Co. v. Allen, 63 Mo. App. 456; Ford v. Cameron, 19 Mo. App. 467; Sutter v. Rader, 149 Mo. 297; Wood v. Land, 22 Mo. App. 425; Weilandy v. Lemuel, 47 Mo. 322; Bethune v. Railway, 139 Mo. 574; Wischmeyer v. Richardson, 153 Mo. 556. (2) The resolution did not include and describe the work of bringing Holmes street to the established grade. R. S. 1899, sec. 5989; Carthage v. Badgley, 73 Mo. App. 126; Nevada v. Eddy, 123 Mo. 558; Wheeler v. Poplar Bluff, 149 Mo. 43; Kolkmeyer v. Jefferson City, 75 Mo. App. 678; Springfield v. Weaver, 137 Mo. 668; Knopfi v. Gilsonite Co., 92 Mo. App. 276; Fay v. Reed, 128 Cal. 357, 60 Pac. 527; Ladd v. Spencer, 23 Ore. 193, 31 Pac. 474; In re Central Park, 51 Barb. 304. (3) It is a fundamental principle that the determination of the character and kind of improvement is a legislative function and must be performed by the board of aldermen. This must be done by ordinance, and the contract must follow the ordinance. Galbreath v. Newton, 30 Mo. App. 393; St. Joseph v. Wilshire, 47 Mo. App. 131; Mfg. Co. v. Hamilton, 51 Mo. App. 120; Dunn v. McNeely, 75 Mo. App. 217; Rose v. Trestrail, 62 Mo. App. 352.

ELLISON, J.—This action was brought to enforce a special taxbill against defendant's property in Westport, a city of the fourth class. At the close of the evidence the trial court gave a declaration that the plaintiff was not entitled to recover. By the terms of sec-

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tion 5989, Revised Statutes 1899, the city council of Westport was authorized to contract for curbing and paving streets and to make the expense thereof a charge against the abutting property. To do so the council was first required to declare by a published resolution that such work was deemed necessary. If the street to be paved had not been graded to the established city grade, and the council did not deem the general revenue fund of the city in condition to stand that expense, it could make that part of the work also chargeable against the abutting property, by including in the resolution aforesaid a declaration that it deemed the grading necessary to be done, but that the revenue of the city was not in condition to pay for it, *and also including therein a description of the work of bringing the street to the established grade.* Sec. 5988.

In this case the resolution omitted the latter requirement entirely and no description of the work of grading was given. In the recent case of City of Kirksville ex rel. v. Coleman, 77 S. W. 120, we held that to be an essential requisite to the validity of the bill and consequently we must affirm the trial court in the view that the taxbill is void. Fay v. Reed, 128 Cal. 357.

Another ground amply sustaining and upholding the judgment is based on a failure to comply with the following portion of the ordinance and contract, viz.: ". . . Upon this base shall be spread a wearing surface of three inches in thickness of crushed river gravel broken to pass through a two and one-half inch ring. The whole to be rolled until it has a smooth even surface with center as high as the tops of the curbs. Each course will be thoroughly wetted before being rolled." The evidence shows that there was substituted for this requirement a gravel taken indiscriminately from the river bed, only a small portion of which was crushed. It was shown that crushing was a substantial consideration in the material to be used. That by crushing, the gravel was left in rough and angular shapes; while un-

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crushed, it was small, smooth and round. That in the former condition it would bind and become formed into a solid and practically immovable body; while in the latter condition the gravel or pebbles would fail to stay in place, but would roll and be insecure. So from this, it appears that the ordinance and contract called for a material which should be a crushed material and the city engineer and contractor substituted something substantially different. In so doing they violated the ordinance and rendered the taxbills void. In the case of Galbreath v. Newton, 30 Mo. App. 393, and others reported since, there will be found the reasons for this holding given at length. They may be summed up in the general statement that the determination of material for street improving is a matter of legislative discretion lodged with the council which can not be usurped by a ministerial officer.

But counsel while conceding the strength of the evidence showing that the gravel was not crushed contends that there was evidence sufficient to make an issue of fact as to whether the contract and ordinance meant that substantially all the gravel should be crushed; or that it should be gravel gathered indiscriminately and put through a crusher, so that no piece should be larger than the size mentioned. They contend that the trial court seriously erred when, as is claimed, it peremptorily declared that the finding must be for defendant. The specific claim is that by such declaration, or instruction, the trial court refused consideration of the evidence in behalf of plaintiff's theory. We think this is not a correct view of the trial court's action. The record, as given in plaintiff's abstract, is that at the close of the evidence "the defendant asked an instruction from the court that the plaintiff is not entitled to recover," which the court gave. The plaintiff did not ask any declarations.

The trial being before the court without a jury, the instruction given was no more than an announcement by

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the court that, in its opinion, the law and the evidence required a finding for defendant. By such declaration the court did not withdraw from itself a consideration of any part of the evidence. Stone v. Spencer, 77 Mo. 356. It is said in that case that if the issues of fact had been submitted to a jury, the instruction would have been improper, but not so, when submitted to the court.

The foregoing renders it unnecessary to consider several other objections urged against the validity of the taxbill.

The judgment is affirmed. All concur.

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LILLIE P. MURRELL, Respondent, v. THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

**Kansas City Court of Appeals, February 15, 1904.**

1. **RAILROADS: Negligence: Ordinance: Speed.** Running a train through an incorporated city at a greater rate of speed than is prescribed by the ordinance regulating such matters is such negligence as to render the defendant liable for personal injury caused thereby.

2. ———: ———: **Trespasser: Licensee.** Where the defendant railroad had sign-boards warning people on its tracks and right of way of danger, but the warning had never been obeyed for a great number of years as was known to the defendant's employees. *Held*, plaintiff, who was injured while walking over its tracks was not a trespasser.

3. ———: ———: **Avoiding Danger After Notice.** Though the plaintiff be guilty of negligence which ordinarily bars recovery, yet if the defendant's negligence in the speed of the train rendered it impossible to stop the same after plaintiff's negligence and danger is discovered, the company is guilty of negligence which created the impossibility and is liable for the resulting injury.

4. ———: ———: **Speed: Ordinance: Licensee: Instructions.** Instructions are reviewed, approved and criticised.

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5. ——: ——: **Persons on Track: Engineer's Duty: Speed.** The rule that an engineer may rightfully assume that persons seen on or along the track will get out of the way does not apply where the speed is unlawful and the engineer fails to reduce it within the legal limits after seeing a person on or near the track. Moore v. Railway, 176 Mo. 528, distinguished.

6. ——: ——: **Contributory Negligence: Plaintiff's Assumption.** Though plaintiff, a licensee on the railroad track, may have observed the approaching train, yet he has the right to assume the speed to be lawful and conduct himself accordingly.

Appeal from Cole Circuit Court.—*Hon. J. E. Hazell*, Judge.

AFFIRMED.

*Wm. S. Shirk* for appellant.

(1) The plaintiff was a trespasser on defendant's tracks. Under such circumstances, she was not even a licensee, but a naked trespasser. R. S. 1899, sec. 1105; Hyde v. Railway, 117 Mo. 202; O'Donnell v. Railway, 7 Mo. App. 190; Ostertag v. Railroad, 64 Mo. 421; Railway v. Talbot, 85 Ga. 447; Railway v. Meyers, 136 Ind. 242; Gweeney v. Railroad, 128 Mass. 5; Glass v. Railway, 94 Ala. 581; Railway v. Godfrey, 71 Ill. 500; Blanchard v. Railway, 126 Ill. 799; Eggman v. Railroad, 47 Ill. App. 507; Railway v. State, 62 Md. 479. (2) The plaintiff was a trespasser even under the following Missouri cases, usually cited to a contrary doctrine: Williams v. Railway, 96 Mo. 275; LeMay v. Railway, 105 Mo. 361; Lynch v. Railway, 111 Mo. 601; Easley v. Railway, 113 Mo. 236; Fielden v. Railway, 107 Mo. 645; Morgan v. Railway, 159 Mo. 262. (3) Being a trespasser, the engineer and fireman was not bound to be upon the lookout for her. Elliott on Railways, sec. 1252, p. 1957, and the following: Williams v. Railroad, 96 Mo. 275; Riley v. Railroad, 68 Mo. App. 652; Rine v. Railway, 100 Mo. 228; Barker v. Railway, 98 Mo. 50; Yarnall v. Railway, 75 Mo. 579; Donohue v. Railway,

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83 Mo. 554; Shaw v. Railway, 104 Mo. 656; Coatney v. Railway, 151 Mo. 49; Hall v. Powers, 12 Metc. 482. (4) The engineer was upon the lookout, and saw her before she put herself in a position of peril. The train was running west, which threw the engineer on the north side of the engine. Plaintiff was south of the track, and the engineer as he run toward her lost sight of her. As she stepped from south of the main track, onto the main track, the fireman saw her, and shouted to the engineer who immediately did all in his power to prevent striking her. This was all that the law requires. Feeback v. Railway, 167 Mo. 266; Dunkman v. Railway, 95 Mo. 232; Guenther v. Railway, 108 Mo. 18; Halliman v. Railway, 71 Mo. 14; Malloy v. Railway, 84 Mo. 270; Langan v. Railway, 72 Mo. 394; Coatney v. Railway, 151 Mo. 49. (5) And the engineer was not bound to slow up his engine or stop it, until he saw her in a position of danger. He had a right to presume that plaintiff being in full sight of his train, would not step upon the track in front of it. Guyer v. Railway, 73 S. W. 584; Reardon v. Railway, 114 Mo. 384; Bell v. Railway, 72 Mo. 50; Maloney v. Railway, 84 Mo. 270; Bunyan v. Railway, 127 Mo. 12. A more pronounced case of contributory negligence it would be hard to imagine. Tanner v. Railroad, 161 Mo. 497; Guyer v. Railway, 73 S. W. 584; Sharp v. Railway, 161 Mo. 214; Vogg v. Railway, 138 Mo. 172; Hook v. Railway, 162 Mo. 569; Peterson v. Railway, 156 Mo. 552; Merrielies v. Railway, 163 Mo. 470; Elliott on Railways, sec. 1166, and note p. 1776; Beach on Con. Neg., sec. 37. And the fact if true that the defendant's fireman and engineer did not ring the bell or sound the whistle was no excuse for this negligence on plaintiff's part. Kries v. Railroad, 148 Mo. 321; Dlauhi v. Railroad, 105 Mo. 645; Corcoran v. Railway, 105 Mo. 399; Hayden v. Railway, 124 Mo. 566; Kelsay v. Railway, 129 Mo. 362; Baker v. Railway, 122 Mo. 533; Vreetland v. Railway, 92 Iowa 292. (6) The court below erred in refusing to sustain

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defendant's demurrer to the plaintiff's evidence at the close of plaintiff's case. (7) And as defendant's evidence did not aid plaintiff's case, the demurrer to all the evidence should have been given. Weber v. Railway, 100 Mo. 194; Eberly v. Railroad, 96 Mo. 361; Glover v. Bolt Co., 153 Mo. 342. (8) There was no acquiescence by the company to the public or persons walking on its tracks. Up to within a month or two at furthest, the railway company kept warning notices posted for many years. Under these notices warning all persons not to walk on the tracks, plaintiff was not even a licensee. Such notices, whether the plaintiff ever saw them or not, prove beyond cavil, that defendant did not permit or sanction such use of its tracks. Hyde v. Railway, 110 Mo. 272; Young v. Railway, 156 Mass. 560; Ward v. Railway, 25 Or. 433; Wright v. Railway, 142 Mass. 296.

*Pope & Belch* for respondent.

We submit the following authorities in support of our position: Hutchinson v. Railway, 88 Mo. App. 376; Morgan v. Railway, 159 Mo. 262; Schmidt v. Railway, 160 Mo. 43; Spencer v. Railway, 90 Mo. App. 91; McAndrew v. Railway, 88 Mo. App. 97; Dieter v. Zbaren, 81 Mo. App. 612; Edwards v. Railway, 94 Mo. App. 36; O'Keefe v. Railway, 81 Mo. App. 386; Independence v. Railway, 86 Mo. App. 585.

ELLISON, J.—Plaintiff was struck and severely injured by one of defendant's passenger engines within the corporate limits of Jefferson City. She brought this action to recover damages on account thereof and had judgment in the trial court for three thousand dollars.

There were two counts in the petition. The verdict for plaintiff was on the second count. That count charged that by the ordinances of said city trains were

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not permitted to run to exceed five miles per hour and were required to ring the bell of the engine while passing through the corporation. That it was the custom and constant habit of people residing in the western part of the city to pass both ways along the tracks of the railways and that this was observed and known by defendant for more than twenty years. The trial court refused all instructions offered by either party and gave a series of its own motion covering the theories advanced by each. The first count may be considered as eliminated from the case, and we will consider the case as made under the second count.

Plaintiff lived with her father in the western part of the city and on the day in question had been to the station to meet a friend expected from St. Louis. She was disappointed and started home alone, going west along the line of defendant's road. She walked perhaps a part of the time on the track and part by the side. She had proceeded on her way considerably more than a quarter of a mile (about 1,800 feet) when she was struck by defendant's engine drawing a passenger train from the east. She admitted in her testimony that she was on the track and that she neither looked nor listened before going onto it.

The engineer and fireman were witnesses for defendant. The former says he had seen a woman walking by the side of the track, but as he got near, she being on the opposite side from him, he lost sight of her. But in a moment a cry of alarm from the fireman caused him to quickly set his emergency brake, and then he saw plaintiff's hat come back across the steam chest followed almost immediately by her body, when she fell off to the side onto the ground. The fireman said that he had been firing and as he raised up he saw plaintiff in the act of stepping onto the track. He immediately caught the bell rope and called to the engineer. Not allowing that plaintiff was carried a distance before being thrown off the side of the engine, the train was stopped in some-

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thing over 300 feet from where she was struck. How far she may have been carried before being thrown off does not appear with any degree of certainty.

There was an abundance of evidence that the train was running at a far greater rate of speed than was prescribed by the ordinance. The facts developed leave ample room for the reasonable inference of two things, either of which would have avoided the accident: First, that if the train had been running at the lawful speed, it could have been stopped by the engineer before it struck plaintiff; or, second, that plaintiff would have cleared the track. Five miles an hour is but little more than a fast walk, and it can readily be seen how quickly the train would have been stopped by the emergency brake, after the engineer undertook to stop it, if it had been going at that safe speed which was prescribed by the ordinance. Conceding plaintiff to have been a trespasser, defendant would not have been under a duty to look out for her. But that concession can not be made with propriety, as we shall show.

The evidence in the cause, including that of the defendant's engineer and fireman long in its service, showed that for many years people had used the right of way and the tracks as a passway. It practically shows that this was with the consent of the company, for while a sign was shown to have been up warning people off, it was never obeyed and defendant knew that for a great many years it had been altogether ignored. The engineer in charge of the train had known it for twenty-four years. It follows that plaintiff was not a trespasser when walking along the track or on the right of way. Morgan v. Railway, 159 Mo. 262. It was the duty of defendant's servants in charge of the engine to keep a lookout for persons on the track, and its liability is not limited to want of care after discovery of the danger. Williams v. Railway, 96 Mo. 275. It was their duty to obey the ordinance as to rate of speed, and in failing to do so they were guilty of negligence. Hutch-

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inson v. Railway, 161 Mo. 246; Karle v. Railway, 55 Mo. 476; Edwards v. Railway, 94 Mo. App. 36.

We thus have both parties to the controversy guilty of negligence. Ordinarily, that bars the plaintiff's right of recovery. But when the railway company's servants see the injured party's peril, or, when by ordinary care they might have seen it, in time to avert a collision, and fail to do so, the company is liable. Morgan v. Railway, supra. And although railway servants use every effort to avoid injury after discovering the peril of the person injured and find it impossible to do so, still, that will not excuse them in cases where they have been "guilty of negligence before, which created the impossibility." Maher v. Railway, 64 Mo. 267.

In this case (as has been already stated) the defendant's engineer saw the plaintiff walking between the tracks for a sufficient distance to have easily stopped the train had he supposed she was intending to get upon the track. He does not say so in express words, but it is only fair to assume that he had no such expectation. He however permitted the train to continue in its unlawful speed without ringing the bell or sounding the whistle, until finally, in answer to the alarm given by the fireman, he attempted, too late, to avoid striking her. The jury have found that if the train had been going at lawful speed, she would have escaped. As it was, a stop was made within the limit of between three and four hundred feet; and we repeat, that if the speed had been that prescribed by ordinance, every reasonable inference from the evidence is, either that it would have stopped before reaching her, or else she would have cleared the track. At any rate, defendant can not excuse itself on the ground of impossibility to stop in time to avoid the injury, when its negligence made it impossible.

Complaint is made of the instructions. We only need notice those relating to the second count as the verdict was not on the first. The second submitted the

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question of speed and declared that if at a greater rate than permitted by ordinance it was negligence. That if such negligent speed was the immediate cause of the train running against plaintiff, and that the collision could have been prevented by the use of ordinary care by the servants in charge of the engine, if the speed had been as prescribed by ordinance, then the finding should be for the plaintiff.

The third instruction, standing alone, is much narrower than the second. It permits a recovery "if the striking and hurting was directly occasioned by defendant's engine being run at a greater rate of speed than five miles an hour . . . although she was a trespasser," unless "she saw or heard the train coming in time to avert the injury." The second instruction not only required the jury to find that the speed occasioned the injury, but that it could have been prevented by ordinary care if the speed had been that required by ordinance. In permitting plaintiff to be taken as a trespasser, the error was in defendant's favor, at least, certainly not a benefit to plaintiff. But the fault in omitting to qualify the statement by adding a clause as to the engineer being able to stop if the rate of speed had been proper, was cured by instruction number eight, which reads as follows:

"And as to first alleged act of negligence in the second count of plaintiff's amended petition, the court instructs you that although you may find from the evidence that defendant's engine, at the time it struck the plaintiff, was running at a greater rate of speed than five miles per hour, and that such rate of speed was in violation of an ordinance of the city of Jefferson City, yet this fact does not of itself entitle plaintiff to a verdict, but before you can find for the plaintiff on account of this alleged act of negligence, you must further find from the evidence that such rate of speed in excess of five miles per hour was the direct and efficient cause of plaintiff's being struck and that she would not have been

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struck if the engine had been running at the rate of five miles per hour.''

Instructions numbered 10, 11, 12 and 13, submitted the proposition that even though defendant's servants by proper care could have seen plaintiff in time to have avoided running against her, yet if she failed to look or listen, when by so doing she would have seen the trains approach, that she could not recover, unless the jury further believed the hypothesis submitted in instruction number two. Defendant says that the main portions of these instructions were right; but that the qualification at the end nullified them and was error against its interest. We do not think so. To have given these instructions without the last clause would have cut out plaintiff's theory, viz.: that notwithstanding her contributory negligence in heedlessly getting into the perilous position, yet, if defendants's servants saw her, or by diligent lookout, might have seen her, in time to have avoided the injury had the train been going at the legal rate of speed, she could recover.

This case really presents very little difference in evidence. The negligence of plaintiff in not looking can not be disputed. The negligence of the defendant in running its train at the unlawful speed is equally indisputable; especially as plaintiff was seen by the engineer either on, or close to the track. It ought then to have suggested itself to him that the rate prescribed by ordinance would be the safer speed. We do not overlook the fact that engineers are not required to stop or slacken speed every time they see persons on or along the track. They rightfully assume such persons will get out of the way. That rule does not apply when the plaintiff's acts, considered in connection with the unlawful speed, does not justify its application.

But it is urged the views herein expressed are in conflict with decisions of the Supreme Court, principally that of Moore v. Railway, 176 Mo. 528. A majority of the court does not assent to the views ex-

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pressed in that case; but we make no point on that since Judge MARSHALL distinctly shows, and he repeatedly states, that the deceased in that case walked up to the side of the track and stopped when the car was within twenty feet of her, then when the car was within five feet of her, she deliberately stepped onto the track and was immediately struck and killed; and that *she would have been struck though the car had been running at the lawful speed prescribed by the ordinance,* or even a great deal less. This case presents no such facts, for here the jury has found (as might reasonably be done) that had the train been running at lawful speed, the plaintiff would not have been struck. To apply the Moore case and much of the argument of defendant, to this case, we would be compelled to depart from the facts disclosed by the present record. It may well be conceded to be a true legal proposition that if one intending to cross a railway track and knowing that a train is bearing down upon him at a high and unlawful rate of speed, deliberately steps in its way when it is so near that it can not be stopped, he can not recover, notwithstanding the speed was unlawful. But there is no such fact in this case.

Even if plaintiff had looked and had seen the train, as some of the evidence tended to show, she would have been justified in assuming that it was running at the lawful speed, five miles per hour, and to have governed her conduct accordingly. Jackson v. Railway, 157 Mo. 621; Weller v. Railway, 164 Mo. 180, 199; Hutchinson v. Railway, 161 Mo. 246.

What we have already said sufficiently disposes of the complaint of error in refusing defendant's instructions. In view of the evidence and the small difference therein as to any part of the real controversy, we believe the case was fully and fairly submitted.

The judgment will therefore be affirmed. All concur.



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# J. S. LAPSLEY, Respondent, v. MERCHANTS BANK OF JEFFERSON CITY, Appellant.

**Kansas City Court of Appeals, February 15, 1904.**

1. **BANKS AND BANKING: Statutory Construction: Dividends: Surplus.** The provision of section 1293, Revised Statutes 1899, requires that 10 per cent of the net profits shall be set aside as surplus before dividends can be declared on the stock; this provision is mandatory since any other construction would defeat the whole aim and object of the statute. Adhered to on motion for rehearing.

2. ———: **Dividends: Surplus: Pleading: Issues.** In a stockholder's suit for dividends on his stock the petition averred that the directors declared the dividend and that they had competent authority to so do. The answer in addition to a general denial alleged the dividend was illegal and payment unlawful and denied that such dividend was in law or fact ever declared. No objection was made to the indefiniteness of the answer. *Held*, the question can be raised on the pleadings as to whether 10 per cent had been carried to the surplus before declaring the dividend.

3. ———: **Officer's Salary: Instruction: Contract.** If the president of a bank fails to comply with the contract of his employment, he ought not to recover on it, and instructions to that effect should be given. Adhered to on motion for rehearing.

4. ———: **Pleading: Evidence: Objection.** While the pleading in this case was broad enough to admit the evidence of failure to carry a part of the earnings to the surplus fund, yet if it be not so, the fact that the evidence was admitted without objection precludes the plaintiff from raising the point.

5. **APPELLATE PRACTICE: Motion for New Trial: Abstract: Record Proper.** When the appellant fails to make it appear in his abstract that the record proper shows that the motion for a new trial was filed and overruled, yet if the additional abstract of the respondent shows such fact, that is all that is necessary since a recitation of the fact and not a copy of the record is sufficient.

Appeal from Osage Circuit Court.—*Hon. W. A. Davidson*, Judge.

REVERSED AND REMANDED (*with directions*).

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*W. S. Pope* and *W. L. Vaughan* for appellant.

(1) Defendant contends that a dividend of five per cent could not have been paid out of the net earnings of the previous year, after setting aside ten per cent thereof as required by law; that the directors did not pretend to set aside anything to the surplus fund before declaring the dividend, and that such dividend was declared contrary to the provisions of sec. 1293, R. S. 1899; and that the court by refusing declaration of law numbered 6, asked by defendant, ignored the fact that the directors had not complied with said section of the statute and had declared a dividend that could not be paid out of the net earnings of the preceding year, after deducting ten per cent thereof and setting it aside for the surplus fund. Hall's Bank Laws, secs. 26-7-8; 1 Morse on Banks and Banking, sec. 66, sec. 172b, sec. 128a; Brown's National Bank cases, 493; Insurance Co. v. Page & Richardson, 56 Ky. 412, 17 B. Monroe; Ball on National Banks, 19. (2) "Losses and bad debts must be deducted in arriving at net profits." May hold dividend for debt of shareholder. Ball on National Bank, 200; Cleveland's Bank Laws, 5, secs. 2, 3, 4, 5; Balles on National Banking, section 107; R. S. 1899, sec. 1288. (3) The refusal of the court to give instructions 8, 9 and 10, asked by appellant, clearly indicates that the court did not take into consideration the question as to whether the respondent complied with the terms of his employment. The court took the view that he was entitled to the six months' salary regardless of the manner in which he performed his duties.

*Ryors & Vosholl* and *Silver & Brown* for respondent.

(1) The objection that the directors before declaring the dividends omitted to set apart ten per cent

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of the net profits to the surplus fund, and therefore plaintiff can not recover the dividends sued for was rightly overruled. (a) Because no defense of this character was set up in the answer. Christian v. Ins. Co., 143 Mo. 461; Musser v. Adler, 88 Mo. 445. (b) Because section 1293, R. S. 1899, is directory in its character and the consequence contended for by appellant does not attach because of its non-observance. Wolf v. Brown, 142 Mo. 612. (c) Because the observance of said section 1293 by banks is properly enforcible by the Secretary of State under the State banking laws. R. S. 1899, secs. 1304-5. (d) Because it appears from the evidence that after deducting from the earnings the dividend of five per cent declared on defendant's capital, there remained in said earnings a sum largely in excess of ten per cent thereof as the same stood before the declaration of the dividend.

ELLISON, J.—The plaintiff was president of the defendant bank and was likewise a stockholder and director. He charges in the first count of his petition that the bank owes him a dividend of five per cent on his stock; and in the second count, that it owes him for six months' salary as president. On trial before the court judgment was rendered for plaintiff on each count.

It appears that the defendant bank was in such condition as to alarm the Secretary of State who has in charge, as a department of his office, the supervision of all banks with State charters. It had loaned to plaintiff and two others associated in the grocery business with him and also directors in the bank sums aggregating largely more than the capital stock. It was in such condition on that and other important matters as to cause the Secretary to advise the directory that if the indebtedness was not reduced and the affairs of the institution quickly put into a more satisfactory condition, he would be compelled to adopt stringent meas-

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ures under the law. It appears that an examination had been made by one of the Secretary's bank examiners in the first part of January, 1900, and that from thence on till the 29th of that month the Secretary was demanding that the institution be put upon a more businesslike footing. On the 15th of that month, the directors, including this plaintiff and his two associates in business, made and entered the following dividend order:

"After cashier had made a statement of the earnings of the bank for the past year, upon motion, the Board declared that a dividend of 5 per cent be paid to stockholders. The shares paid up in May to receive only a pro rata share of said 5 per cent according to the time the money for said shares has been in possession of the bank."

Defendant contends that this order was made without first setting aside 10 per cent of the net profits of the bank for the period covered by the dividend and was therefore in violation of the express provisions of the statute, section 1293, Revised Statutes 1899, which reads as follows: "The board of directors of any bank institution in this State, when it shall declare a dividend, shall first set apart to the surplus fund ten per cent of the net profits of the bank for the period covered by the dividend, until the same shall amount to 20 per cent of its capital stock, and said surplus shall not be diminished except for the payment of any losses which may occur: Provided, if there are undivided profits, these shall first be used in payment of such losses."

Plaintiff claims this statute to be merely directory and that a compliance therewith is not necessary to enable him to recover the dividend declared in the order. We are clearly of the opinion that plaintiff's claim is not the proper construction of the statute. The statute in positive terms declares that 10 per cent of the net profits shall be first set apart to the surplus

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fund until that fund shall amount to twenty per cent of the capital stock. The evident object and purpose of the statute was to create a fund, in addition to the capital stock, for the security of depositors and others doing business with the bank. Current history shows an unmistakable demand on the part of the people and a corresponding effort on the part of the law-makers to provide safe banking methods. And undoubtedly the statute in question, which is recently enacted, was to secure that end in whatever degree it would be secured by a strict compliance therewith. "Where the whole aim and object of the legislature would be plainly defeated if the command to do the thing in a particular manner did not imply a prohibition to do it in any other, no doubt can be entertained as to the intention." Endlich on Statutes, section 431.

As just stated, it is manifest that the "aim and object" of the statute in question is to compel the accumulation of a surplus fund out of net profits, and it is equally manifest that the result may not be secured if dividends are permitted to be declared and paid out of such profits in preference to the surplus. Whenever third persons or the public have an interest in having done that which is prescribed by the legislature then the act is mandatory, even though words permissive, as "may," are used, instead of words mandatory as, "shall." Potter's Dwarris on Statutes, 220. Before there can be a dividend which the law would recognize in a suit to recover it, there must be a net profit; and then the dividend can only be declared on that portion of the profit remaining after ten per cent has been set aside to the surplus fund. Such process for the allowance of dividends continues under the terms of the statute until the surplus shall have equalled twenty per cent of the capital stock.

It is, however, claimed by plaintiff that defendant did not set up this defense in its answer. We are of the opinion that connecting the answer with the allegations

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of the petition that the board of directors declared the dividend and that "said board had competent authority so to do;" it stated enough to let in such defense. The answer, besides being a general denial, alleged that the dividend was illegally declared. It alleged that the reason the dividend had not been paid was "because the payment thereof would have been unlawful." It furthermore denied that "any such dividend as stated in plaintiff's petition was in law or fact ever declared." No objection by way or motion or demurrer was made that the answer was incomplete, or otherwise indefinite, or uncertain.

Passing to plaintiff's claim for salary as set up in the second count of the petition, we are of the opinion that error was committed in refusing defendant's instructions Nos. 9 and 10. It does not appear upon what possible theory they could have been refused, since they were amply supported by evidence. If plaintiff failed to comply with his contract he surely ought not to recover on it.

The judgment will be reversed and the cause remanded with directions to enter judgment for defendant on the first count and for a new trial on the second.

*Broaddus, J.*, concurs; *Smith, P. J.*, not sitting.

OPINION ON MOTION FOR REHEARING.

ELLISON, J.—Plaintiff seeks a rehearing of this and the case of Edwards against this defendant (argued and submitted together) on several grounds. One that the statute construed is directory and not mandatory. This is but a reassertion of the principal point in the case as orignally presented and which we have disposed of in the opinion. We see no reason for departing from what was there said. We do not regard McClintock v. Bank, 120 Mo. 127, as applicable to the question.

It is next insisted that defendant is precluded by

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its answer from using the statute as a defense in that such defense was not specially pleaded. We are of the opinion that the answer, while not as specific as it should have been, is unquestionably broad enough to admit such evidence. But, if we should concede that it was not, plaintiff's point would still be untenable, from the fact that evidence was admitted on that head without objection from him. The rule is that though it be necessary to plead a matter by answer, yet if it be not pleaded and evidence is admitted without objection on that account, the failure to plead is considered as waived. Judge GANTT likens such failure to object to instances where a failure to file a reply was not allowed to be raised by the defendant after he had gone through the trial without making that point. Price v. Hallett, 138 Mo. 561; that case was directly affirmed in an opinion by Judge BURGESS in McDonnell v. De-Soto Savings Ass'n 175 Mo. 250, 275. The reason of the rule is apparent when it is considered that if objection had been made to the evidence the defendant could have elected to amend the answer. Plaintiff relies on Weaver v. Hendrick, 30 Mo. 502, and some other cases, but we consider none of them in point.

It is next urged that we overlooked the points made in the briefs that defendant's abstract is not sufficient to permit us to examine more than the record proper. That matters of error in the trial are not properly before us for review. The ground of objection stated by plaintiff is that the abstract fails to show the *overruling* of the motion for new trial and in arrest by entry of the record proper. The overruling of the motion for new trial and exception thereto is fully set out in the bill of exceptions. It has, however, been held by the Supreme Court, and this court, that the filing of a motion for new trial should be shown by the record proper. St. Charles ex rel. v. Deemar, 174 Mo. 122; Western Storage Co. v. Glasner, 150 Mo. 427; Lawson v. Mills, 150 Mo. 428; Crossland v. Admire,

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149 Mo. 650; Hill v. Combs, 92 Mo. App. 242; Turney v. Ewins, 97 Mo. App. 620; McCormack v. Crawford, 98 Mo. App. 319. But allowing that plaintiff intended to include in his objection to the abstract that it also failed to show the motion for new trial was filed, we must still rule the point against plaintiff. Plaintiff himself has relieved the case of that defect or objection. He filed as under the statute he may, an additional abstract and a statement. In the latter he gives a full abstract of the petition, answer and replication. He then states in detail what was shown in evidence by each party; the finding and judgment and the amount thereof and the filing and overruling of the motion for new trial.

A motion for new trial, of course, should be filed, and it should be made to appear by the abstract. But when the appellant fails to make it appear and the respondent concedes, by an affirmative statement, that it was filed, it is all that is necessary. It is not necessary to set out copies of the record entry of filing. The abstract may state the fact in narrative form (State ex rel. v. Smith, 172 Mo. 446, 458) and we can see no reason why the admission by the respondent is not sufficient to supply the omission by appellant. Jurisdiction of the appeal is not based on the abstract. The certificate of the judgment of the trial court certified, as provided by statute, in the basis of the proceedings in the appellate court (State ex rel. v. Smith, 172 Mo. 618), and it seems to us to be entirely competent for the respondent to supply some necessary statement in the appellant's abstract, by a statement of his own of the matter omitted.

The motion in each case should be overruled. *Broaddus, J.*, concurs; *Smith, P. J.*, not sitting.

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# THOMAS HURT, Respondent, v. NARCISSA B. JONES, Appellant.

**Kansas City Court of Appeals, February 15, 1904.**

1. **REAL ESTATE BROKER: Commissions: Principal and Agent: Ratification.** Where a landowner on full knowledge adopts a sale made by a broker and conveys the land to the purchaser named in the contract he is estopped to deny the broker's agency and his right to compensation, and such owner may claim benefits of a contract made by his agent with the broker.

2. **EVIDENCE: Value of Services: Custom.** Though a custom may not be proven to alter a general principle of law, yet such evidence is admissible as to the value of services.

Appeal from Benton Circuit Court.—*Hon. W. W. Graves,* Judge.

AFFIRMED.

*Theo. L. Carns* and *John Burgin* for defendant.

(1) The evidence in no sense supports the verdict. Even if Burgin had been Mrs. Jones' agent to sell said farm and Burgin had come to Missouri and employed Hurt and Hurt had procured Hess, the purchaser, and Mrs. Jones conveyed to Hess, still then Hurt would have no cause of action against Mrs. Jones. Hanback v. Corrigan, 54 Pac. 129; Homan v. Ins. Co., 7 Mo. App. 22; Hill v. Morris, 15 Mo. App. 322. (2) An agent to sell real estate can not delegate his authority to a subagent and obligate his principal to pay subagent's commission. Atlee v. Fink, 75 Mo. 100; McClure v. Ins. Co., 4 Mo. App. 148; Floyd v. McKay, 66 S. W. 518. (3) Thomas Hurt, plaintiff, did not bring the parties together and was not the procuring cause of the sale. Vandyke v. Walker, 49 Mo. App. 381; White v. Twitching, 26 Hun 503; Collier v. Johnson (Ky.), 67 S. W.

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830; Jones v. Frost, 53 N. Y. 573, 24 Misc. 208. (4) Hurt, the plaintiff, acted in the interest of Hess and not in the interest of Mrs. Jones, defendant. Haynes v. Frazer, 78 N. Y. 794, 74 App. Div. 627; Callaway v. Trust Co., 5 Atl. 900; Atwater v. Lockwood, 39 Conn. 46. (5) Burgin sold the farm in dispute to Hess under an option held on the farm by Burgin; and Hurt at all times knew of Burgin's said option on said farm. (6) Hurt's claim of real estate commission is an afterthought. Allen v. Rich. College, 41 Mo. 309. (7) There can be no ratification without full knowledge. Atwater v. Lockwood, 39 Conn. 46; Holmes v. Board of Trade, 81 Mo. 137. (8) In a suit in assumpsit for services there can be no recovery without proof of a request or circumstances from which request can be implied. Allen v. Rich. College, 41 Mo. 302; Holmes v. Board of Trade, 81 Mo. 144. (9) Donahue should not have been permitted to testify as to any custom among real estate agents fixing compensation for services over objections made by defendant. Freight Co. v. Stannard, 44 Mo. 71; Ober v. Carson, 62 Mo. 214; Gordon v. Livingston, 12 Mo. App. 274; Bank v. Ward, 100 U. S. 195; Papin v. Goodrich, 103 Ill. 87; Couch v. Coal Co., 46 Iowa 17; Taylor v. Moran, 61 Ky. 121; Coquard v. Bank, 12 Mo. App. 261; Hall v. Benson, 7 Car. & P. 703; Fletcher v. Seekwell, 1 R. I. 271; Pfeill v. Kemper, 3 Wis. 286 and 317; Chenery v. Goodrich, 106 Mass. 566; Shackleford v. Railway, 37 Miss. 208; Bissell v. Ryan, 23 Ill. 569; Shields v. Railway, 87 Mo. App. 637; Bernard v. Mott, 89 Mo. App. 403. (10) In the case at bar there was no evidence of any value of plaintiff's pretended services, and for that reason the evidence fails to support the verdict. Sanford v. Railway, 40 Mo. App. 15; Lemon v. Lloyd, 46 Mo. App. 452; Johnson v. Loomis, 50 Mo. App. 142. (11) The court's instruction to the jury lettered "A" is a false statement of the law and a misdirection of the jury. Burgess v. Allen, 71 S. W. 641; Floyd v. McKay, 66 S. W. 520;

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Homan v. Ins. Co., 7 Mo. App. 22; Hanback v. Corrigan, 54 Pac. 129; Atwater v. Lockwood, 39 Conn. 46; Walter v. Clark, 55 Minn. 34.

*Jas. T. Montgomery* for respondent.

(1) A general agent respecting the control and sale of real estate may bind his principal by the employment of a broker for the sale thereof, notwithstanding the principal's instruction to the agent that she would not consent to the allowance of a broker's commission and therefore the demurrer to plaintiff's evidence offered by the defendant as well as the peremptory instruction asked by the defendant at the close of all the evidence were properly refused by the court. Mosby et al. v. Com. Co., 91 Mo. App. 500; Gold v. Sorrell, 26 N. Y. Supp., affirming New York Supp., 1078. (2) The instructions numbered A, B, C, D, E and F, given by the court of its own motion clearly declared the law under the evidence in this case and fairly submitted every issue of fact in the case to the jury. These instructions were indeed more favorable to the defendant than those offered by her and refused by the court. (3) An agent may show in an action for the value of services in selling land what is usually charged in the same place for like services and may introduce real estate agents to testify to the value of such services, although they usually work on commission. Therefore the court properly refused the defendant's fourth instruction. Glover v. Henderson, 120 Mo. 368. (4) The evidence clearly shows that Hurt was the procuring cause of bringing the seller and buyer together in this transaction. Indeed there is no contradictory evidence on this point. The law is too well settled upon this proposition to necessitate the citing of authorities to this court.

BROADDUS, J.—This suit was begun in the circuit court of Pettis county and taken by change of venue to Benton county.

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The evidence showed that the defendant inherited from her husband 440 acres of land lying in Pettis and Saline counties. Defendant was a resident in the State of Kentucky during the history of this case. The evidence tends to show that John Burgin, an attorney at law and brother of defendant, had the management of the land. She was desirous of selling it and in February, 1902, Burgin, who was also living in Kentucky, came to Missouri and requested the plaintiff to go with him a day or two and help him to make a sale of the land. Plaintiff declined to go but said he could be of some help at a future time. Subsequently, in April following, he wrote to Burgin as follows:

"A friend of mine wanted me to write to you and make you an offer for your land on both sides of the road. He will give you thirty-two and fifty cents per acre." To this Burgin answered: "I send contract blanks to be filled, then to be signed by your friend. If he desires to do business he may fill these blanks and return them to me and I will let him hear from me promptly when I see his proposition in writing."

A contract of sale and purchase of land was entered into between Hess, the person alluded to in plaintiff's letter as his friend who wanted to buy the land, and Burgin. This contract specifies the title to said land to be in defendant. It was shown that defendant knew of the contract and approved of the sale; in fact, she carried it out with some modification as to payment and conveyed the land to said Hess. Defendant came to Missouri with Burgin and called at plaintiff's house, and he was with them at Sedalia a part of the time while the sale was being consummated, and made affidavits to supply some defect in the title. It was also shown that he loaned Hess $2,000, to make the first payment on the land. It was also in evidence that defendant expressed her satisfaction of the manner in which the sale had been made. There was evidence to the effect that defendant had made a verbal sale of the land to said Burgin prior

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to the transaction stated, and had written out a deed of conveyance and taken a trust deed to secure the purchase money but had never made any delivery of the deed of conveyance. However, she conveyed the land in her own name to Hess and the notes for the deferred payments were made payable to her. There was only one witness besides plaintiff as to the value of plaintiff's service who stated that in such cases two and one-half per cent was the usual commission charged by real estate agents. Plaintiff himself testified that his charge was a reasonable one. The extent of Burgin's agency was not shown.

There is no doubt but what plaintiff with the knowledge of Burgin rendered material service in procuring a purchaser for defendant's land. And we can not perceive that it would make any particular difference because the contract of sale procured by the plaintiff was in the name of Burgin instead of in the name of defendant, as it was treated by Burgin and defendant as the sale of defendant's land. The evidence was that she approved of the sale and carried it out with the exception of some change in the manner of payment. And the act of approval by defendant of the contract was an approval of plaintiff's agency. At law, defendant had the right to claim the benefit of the contract made by her agent in his own name. But in doing so, she assumed the obligation to pay the plaintiff for his services whether her agent had the authority or not to employ him. Holmes v. K. C. Board of Trade, 81 Mo. 137. With full knowledge of all the facts she adopts the sale so made and conveys the land to the purchaser named in the contract. She ought to be estopped from denying plaintiff's right to compensation for his services. Mosby v. Com. Co., 91 Mo. App. 500.

The court adopted this theory of the case presented by instruction A, which is as follows: "The court instructs the jury that if you find and believe from the evidence that John Burgin was the agent of Mrs.

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N. B. Jones for the transaction of her business and that said John Burgin directed the plaintiff in the suit to sell the farm of Mrs. Jones and the said plaintiff did sell said farm, and Mrs. Jones completed said sale thereafter, with the purchaser procured by plaintiff, then you will find for the plaintiff,'' etc.

The witness Donahue testified that two and a half per cent was the usual and customary charge for real estate. To this evidence defendant objected. A great many cases have been cited upon the question raised but we find they have no application. They are to the effect that evidence of custom is never admissible to oppose or alter a general principle or rule of law so as to make the rights and liabilities of parties other than they are at law. Southwestern Freight & Cotton Press Co. v. Stanard, 44 Mo. 71; Ober v. Carson, 62 Mo. 214. But such evidence is always admissible to prove the reasonable value of services. It follows therefore that there was competent evidence of the value of plaintiff's services. Besides, plaintiff himself testified that they were reasonable.

The question of whether plaintiff was acting as the agent of Burgin or defendant was submitted to the jury and the finding was that he was the agent of defendant. But under the ruling, that question has lost its significance.

The cause is affirmed. All concur.

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# D. WISHART, Respondent, v. SUSAN M. GERHART, Appellant.

Kansas City Court of Appeals, February 15, 1904.

1. **DEEDS: Consideration: Parol Evidence: Estoppel: Statute.** Where a deed recites a consideration a party is estopped from defeating its operative effect as a conveyance; and section 645, Revised Statutes 1899, does not effect the law of estoppel and a grantor can not defeat the conveying effect of such deed by showing it was voluntary.

2. ———: ———: ———. Wherever a deed is valid or creates or extinguishes a right by contract or otherwise, parol evidence is inadmissible to alter or contradict the legal construction of the instrument and the grantor can not gainsay it.

3. **FORCIBLE ENTRY AND DETAINER: Complaint: Description: Remedy.** A complaint in unlawful detainer is held sufficient although it fails to state that the property is in the city ward of the justice before whom it is filed; and a grantee who purchases at foreclosure sale may maintain unlawful detainer against the grantor.

Appeal from the Jackson Circuit Court.—*Hon. Andrew F. Evans,* Judge.

AFFIRMED.

*Kenneth McC. DeWeese* for appellant.

(1) The court erred in refusing to permit defendant to prove that said note and deed of trust were given wholly without consideration. Section 645, Revised Statutes 1899. This section was 2090 in the revision of 1889, and section 3725 in the revision of 1879, and section 24, page 686, General Stat. 1865, and section 24, page 1290, Revised Statutes 1855. (2) Contracts by specialty are those reduced to writing and attested by a seal—or to use the common phrase, "contracts

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under seal," etc. 1 Parsons on Contracts, page 7, The common law made no distinction in contracts except between contracts which are and contracts which are not under seal. Beckham v. Drake, 9 M. & W. 92; 22 Am. & Eng. Enc. Law (1 Ed.), 905; 2 Black Comm., 465; Neb. 85-87; 2 Bond 104; 1 Dallas 208; 1 Binn. 254; 8 Peters 371; Bouvier's Law Dictionary, (Specialty); Bacon's Abridgment (Obligation); Wharton on Con. 680; Chilton v. People, 66 Ill. 501; Bishop on Contracts, sec. 104; 1 Parsons on Contracts, page 7; Bishop on Contracts, section 103-139. Section 645, Revised Statutes 1899, is a positive statute. Some force and effect must be given to it. Ring v. Kelly, 10 Mo. App. 411; Winter v. Railroad, 73 Mo. App. 173; Winter v. Railroad, 160 Mo. 159; Davis v. Petty, 147 Mo. 374-383; Squier v. Evans, 127 Mo. 514. (4) I am aware of the rule that written contracts will, in the absence of fraud, be conclusively presumed to include the whole engagement and the extent and manner of the undertaking. New England L. & T. Co. v. Workman, 71 Mo. App. 275. (5) The consideration is no part of the contract. It is not embraced in the definition of a contract, and lies on the outside of it. 1 Parsons on Contracts, pages 6 and 7; Wharton on Contracts, sec. 540. (6) The consideration clause in the written agreement forms of itself no part of the contract, and is not essential to its validity, and is not conclusive as to the amount of the consideration. Holt v. Holt, 57 Mo. App. 272; Hickman v. Hickman, 55 Mo. App. 303; Edwards v. Smith, 63 Mo. 119; Liebe v. Knapp, 79 Mo. 22; Hall v. Morgan, 79 Mo. 47; Allen v. Kennedy, 91 Mo. 324; Bridges v. Russell, 30 Mo. App. 258; Winningham v. Pennock, 36 Mo. App. 688; Fontaine v. Boatman's Savings Inst., 57 Mo. 552; Hallocher v. Hallocher, 62 Mo. 267; Dobyns v. Rice, 22 Mo. App. 448; Squier v. Evans, 127 Mo. 514; Pomeroy on Contracts (2 Ed.), section 57, p. 7980-81; 5 New York Revised Statutes, p.



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406, par. 77; Wilson v. Baptist Ed. So., 10 Barb. 308; Pomeroy on Contracts (2 Ed.), note to section 57, p. 81; section 2388, Revised Statutes 1889. (7) The complaint did not state facts sufficient to constitute a cause of action. Revised Statutes, section 4131; Champ Spring Co. v. Roth Tool Co., 93 Mo. App. 530, 70 S. W. 506.

*J. C. Rosenberger* for respondent.

(1) Where a deed recites a consideration, the grantor is estopped from afterward attempting to show that the deed was without consideration. Hollocher v. Hollocher, 62 Mo. 267; Bobb v. Bobb, 89 Mo. 419; Allen v. Kennedy, 91 Mo. 328; McConnell v. Braymer, 63 Mo. 464; Henderson v. Henderson, 13 Mo. 151; Dobyns v. Ins. Co., 144 Mo. 95; Holt v. Holt, 57 Mo. App. 275; Hickman v. Hickman, 55 Mo. App. 311; Jackson v. Railroad, 54 Mo. App. 636. (2) This statute is first found in the revision of 1845, page 832, and it has been carried into every subsequent revision in the same form and language to this day. The statute was not intended to apply to contracts which had been fully executed and performed such as a deed or other conveyance but only to executory or unperformed agreements. Thus we find that specific performance will not be decreed of an executory agreement for which there was no consideration but a voluntary deed is good betweeen the parties even though there may have been no consideration at all. Davis v. Petty, 147 Mo. 374; Jackson v. Railroad, 54 Mo. App. 636; Randall v. Ghent, 19 Ind. 271; and cases supra. (3) The offered evidence was properly excluded for the further reason that it went directly to the merits of plaintiff's title. This can not be done in an action of unlawful detainer. The sole question at issue was the right to the possession, not the title. If appellant was tenant of the plaintiff under the lease clause of the deed of trust and the lease

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had expired; then plaintiff was entitled to the possession and that was an end of the controversy. Sec. 3343, Revised Statutes 1899; Pierce v. Rollins, 60 Mo. App. 497; Sitton v. Sapp, 62 Mo. App. 197; Greenwald v. Schaales, 17 Mo. App. 327; Davis v. Petty, 147 Mo. 374. (4) The justice of the peace before whom this suit was instituted, did not have jurisdiction, etc. Wade v. McCormack, 68 Mo. App. 14.

ELLISON, J.—This is an action of unlawful detainer. The judgment in the trial court was for plaintiff. Plaintiff's right to the property is founded upon a deed of trust, in the usual form, executed by defendant to plaintiff to secure to him the payment of $3,000, and which the plaintiff had foreclosed. The deed recited that it was executed, "in consideration of the debt and trust hereinafter mentioned and created and the sum of one dollar." At the trial defendant offered to prove that the deed was, in fact, without consideration. Plaintiff's counsel objected to the evidence and the trial court thereupon refused defendant's offer. The defendant bases his case on section 645, Revised Statutes 1899, which reads as follows: "Whenever a specialty or other written contract for the payment of money, or the delivery of property, or for the performance of a duty, shall be the foundation of an action or defense in whole or in part, or shall be given in evidence in any court without being pleaded, the proper party may prove the want or failure of the consideration, in whole or in part, of such specialty or other written contract." We are of the opinion that this statute does not support defendant's position in a case of this nature. Where a deed recites a consideration, it, when not contractual, may be shown to be different, yet, a party is estopped by such deed from defeating its operative effect as a conveyance Henderson v. Henderson, 13 Mo. 151; Bobb v. Bobb, 89 Mo. 411-419; Dobyns v. Beneficiary Ass'n, 144 Mo. 95-109. This court has recognized and applied those au-

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thorities in a variety of cases. Jackson v. Railway, 54 Mo. App. 636; Davis v. Gann, 63 Mo. App. 425.

The statute manifestly does not affect the law of estoppel, or the inviolability of written contracts. If a grantor should sue his grantee for the sum stated as the consideration in the deed, the statute permits the grantee to show that there was no consideration and there could be no recovery. So, if the grantee, claiming a breach of warranty, should sue the grantor for all, or part of the consideration stated in the deed, the grantor, by the terms of the statute, could show there was no consideration and thus escape payment on the warranty; but he could not, in the absence of fraud, avoid the deed itself. For even a voluntary deed is binding as a conveyance between the parties.

No rule of law is more firmly established than that, in the absence of fraud, accident or mistake, oral evidence can not be received to vary or contradict a written contract. A deed of conveyance is a contract of conveyance and the grantor will not be permitted to say that it is not; and the statute does not say that he may. The statute says that he may show that there was no consideration for it, but that is not saying he may show it was not a deed. For, showing there was no consideration for a deed does not, in fact, destroy its operative effect between the parties. The law, without regard to the statute, is that you may show the recited consideration in a deed to be different, "but wherever a right is vested or created, or extinguished, by contract or otherwise, and a writing is employed for that purpose, parol testimony is inadmissible to alter or contradict the legal construction of the instrument. . . . Thus a will, a deed or a covenant in writing, so far as they transfer, or are intended to be the evidences of rights, can not be contradicted or opposed in their legal construction by facts *aliunde.*" Davis v. Gann, 63 Mo. App. 425; That quotation is taken from Gully v. Grubbs, 1 J. J.

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Marsh, 387, as it has been quoted and adopted in McCrea v. Piermont, 16 Wend. 460.

In New York, where so far as this question is concerned, the statute is like ours, it was said: "It has never been held that a deed can be so far contradicted by parol as to show that it was not intended to operate at all, or that it was the intention or agreement of the parties that the grantee should acquire no right whatever under it, or that he should reconvey to the grantor on his request without any consideration." Hutchins v. Hutchins, 98 N. Y. 56. See also Draper v. Shoot, 25 Mo. 202.

We think the complaint states a cause of action; and that it was not necessary that it allege the property was in the city ward of the justice before whom it was filed. Section 3323, Revised Statutes 1899. So we think that plaintiff invoked the proper remedy. He is a purchaser under a deed of trust. As such grantee, he may maintain unlawful detainer under the statute. Sexton v. Hull, 45 Mo. App. 339.

The judgment should be affirmed. All concur.

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WILLIAM M. HOLLAND, Respondent, v. ST. LOUIS AND SAN FRANCISCO RAILROAD CO., Appellant.

**Kansas City Court of Appeals, February 15, 1904.**

1. **PASSENGER CARRIERS: Negligence: Demurrer to the Evidence. A carrier is responsible for all injury to its passengers from even slight negligence; and on a review of the evidence it is held the circumstances of the case raised the question as to the credibility of defendant's witnesses, whose evidence tends to explain away the presumption of negligence raised by the injury to the passenger, and therefore a demurrer to the evidence was properly overruled. Conflicting authorities noted.**

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2. ———: ———: **Leaving Seat: Instruction.** A passenger has the right to leave his seat in a railroad car temporarily for any legitimate purpose provided he does not expose himself to danger thereby, and the instruction that if the passenger after being furnished a seat voluntarily left it and was standing when injured by being thrown down, he was guilty of contributory negligence, is properly refused.

3. ———: ———: **Instruction.** An instruction set out in a petition relating to a discoverable defect in the machinery is held sufficiently broad to impose upon the defendant the burden to disprove any kind of negligence.

4. **ASSUMPTION OF RISK: Instruction.** It is not the magnitude or the insignificance of a cause producing an injury which regulates the liability of the carrier, but it is his want of care; and an instruction that if the concussion of colliding cars was not greater than the usual concussion incident to the operation of mixed trains, then the plaintiff was held to assume the risk of such concussion is condemned.

5. **APPELLATE PRACTICE: Abstract: Affidavit: Order of Appeal.** An affidavit need not be set out in the abstract where the copy of the record entry recites that an affidavit for the appeal had been filed and an appeal had been allowed.

Appeal from Dade Circuit Court.—*Hon. H. C. Timmonds,* Judge.

REVERSED AND REMANDED.

*L. F. Parker, E. P. Mann* and *J. T. Woodruff* for appellant.

(1) Defendant's demurrer at the close of plaintiff's evidence should have been sustained and the instruction directing a verdict in its favor should have been given. Erwin v. Railroad, 94 Mo. App. 289; Hartley v. Street Railway, 148 Mo. 141; Scott v. Dock Co., 10 Jur. N. S. 1108; Guffy v. Railroad, 53 Mo. App. 469; Wait v. Railroad, 165 Mo. 612; Hite v. Street Railway, 130 Mo. 133; Holt v. Railroad, 84 Mo. App. 443; Frohriep v. Railway, (Mich.) 91 N. W. 748; Claf-

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lin v. Dodson, 111 Mo. 20. (2) The court erred in not sustaining the demurrer which the defendant interposed at the close of the whole case and in refusing to instruct the jury to find for the defendant. See authorities cited above. Hite v. Street Railway, 130 Mo. 140; Railroad v. Talbot, 78 Ky. 621; Railroad v. Turner, 41 Ark. 163; Railroad v. Basham, 47 Ark. 322; Reichenbach v. Ellerbee, 115 Mo. 595; Payne v. Railroad, 136 Mo. 106; Railroad v. Rudolph, 38 S. E. (Ga.) 328; Railroad v. Wall, 80 Ga. 202, 7 S. E. 639. (3) The court erred in refusing instructions numbered 1, 2 and 3 requested by defendant. Tuley v. Railroad, 41 Mo. App. 436; Railroad v. Leftwich, 117 Fed. 128; Freeman v. Pere Marquette Co., 91 N. W. (Mich.) 1021; Smotherman v. Railroad, 29 Mo. App. 265; Auftenberg v. Railroad, 132 Mo. 566; Erwin v. Railroad, 94 Mo. App. 289. (4) The court erred in giving instructions numbered 1, 2, 3, 4 and 5 on part of plaintiff. Tuley v. Railroad, 41 Mo. App. 436; Prior v. Street Railway, 85 Mo. App. 367; Grocery Co. v. Sanders, 74 Mo. App. 659; Hirchner v. Collins, 152 Mo. 397; Goetz v. Railroad, 50 Mo. 472; Clay v. Railroad, 17 Mo. App. 629; Moore v. Railroad, 126 Mo. 178; Thomas v. Babb, 45 Mo. 384; Moore v. Streegel, 50 Mo. App. 308; McNamee v. Railroad, 135 Mo. 447; Cyclopedia of L. & P., 597; Lumber Co. v. Moss Tie Co., 87 Mo. App. 178; Herbert v. Mound City B. & S. Co., 90 Mo. App. 317; Greenleaf on Evidence (16 Ed.), 158; Railroad v. Canman, 52 Ark. 517; Shinn v. Tucker, 37 Ark. 589; Railroad v. Harwood, 80 Ill. 91; Rolling Mills v. Morrisy, 18 A. & E. Railway Cases 48; Railway v. State, 95 Md. 637; Railway v. Fry, 131 Ind. 319; Ballou v. Railroad, 54 Wis. 257; Baldwin v. Railroad, 50 Iowa 680; Railroad v. Flannigan, 77 Ill. 365; Cohn v. McNaulta, 147 U. S. 238.

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*D. P. Dyer* for respondent.

(1) It is well settled by the decision of appellate courts of this State that plaintiff herein by showing the breaking into of the train upon which he was a passenger and the consequent collision of the cars, resulting in his injury made out a prima facie case of negligence against defendant, and thus cast upon it the *onus* of relieving itself from liability by showing that the injury was the result of an accident which "the utmost skill, foresight and diligence could not have prevented." Hipsley v. Railway, 88 Mo. 348; Furnish v. Railway, 102 Mo. 438; Jackson v. Railway, 118 Mo. 224; Clark v. Railway, 127 Mo. 197. (2) There is, we submit no foundation whatever for appellant's contention that the prima facie case thus made out by plaintiff was "explained away" by the testimony of defendant's brakeman Gott, who was called as a witness in behalf of plaintiff. (3) And we may say here that in failing to continuously and carefully inspect these appliances whose faithful operation was so essential to the safety of passengers, the railroad company was grossly derelict in its duty. Furnish v. Railway, 102 Mo. 438; Guthridge v. Railway, 94 Mo. 468; Hipsley v. Railway, 88 Mo. 348; Wolfe v. Campbell, 110 Mo. 114; Schroeder v. Railway, 108 Mo. 322; Gibson v. Zimmerman, 27 Mo. App. 90; Rayl v. Krelick, 74 Mo. App. 245; Cleveland Co. v. Ross, 135 Mo. 101; Seehorn v. Bank, 148 Mo. 256. (4) Instruction No. 1 was properly refused for several reasons. Choate v. Railway, 67 Mo. App. 105; Payne v. Railway, 129 Mo. 405; Spillane v. Railway, 135 Mo. 414. (5) Instruction No. 2 was vicious for several reasons. (6) Instruction No. 3 was properly refused as not being applicable to the case. (7) Plaintiff's instructions were proper. See also Kirchner v. Collins, 152 Mo. 394, to the same effect. Instructions Nos. 2 and 3. Shuler v. Railway, 86 Mo. 618, 623.

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BROADDUS, J.—This is an action by plaintiff to recover damages for injuries alleged to have been received December 24, 1902, while a passenger on one of defendant's trains consisting of four freight cars and a passenger coach, making what is known as a "mixed" train. The coach was a combination car divided by a partition, one part being used for passengers and the other for baggage. According to the plaintiff, this car on the day of his alleged injury was crowded with passengers to the extent that he was unable to obtain a seat, and while he was standing in the aisle of the coach, which was attached to the rear of the train, he was suddenly thrown against a stove and onto the floor because of a violent jar of the car, whereby he was seriously injured.

The testimony showed that the engineer separated the train within about a mile of Greenfield, taking the two front cars to that town and returning for the remainder. Attaching the engine to these latter cars he started forward, whereupon the coupling between two of the cars became detached. Again connecting the cars, he proceeded forward something like a half a mile when the same coupling became detached, again separating the train, the front part of which continued on a distance of 30 or 40 yards when it was stopped by the automatic action of the brakes about the distance named in advance of the detached rear section. These latter cars continued to move forward until they collided with the then stationary front cars with much force, throwing plaintiff against the stove and onto the floor of the passenger coach and causing his injuries complained of.

After testifying to substantially the foregoing facts, J. W. Gott, a brakeman on the train, introduced as a witness by plaintiff, further testified that the cars which separated, as aforesaid, had been attached by what is known as automatic couplers, and air brakes were used.

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After describing the couplers he stated that they were held together by means of a lever which is moved to unfasten them. And when asked if he had examined the couplers in question after they became detached, he said: "Well, I didn't make any real close examination because I couldn't see any reason why they should have come apart, you know, but of course if there had been anything very much wrong with the coupler I would have noticed it without going under the car to make a close examination, but I couldn't see anything." He then further stated that trains using such couplers often become uncoupled, but that, ordinarily, when equipped with air brakes, as here, when the air brake line is parted the brakes are automatically set on the entire train and both sections come to a stop. He could not, however, give a reason why the rear section of the train did not stop in this instance as did the front section after the train separated.

The defendant's evidence tended to show that the cars were equipped with the latest and most approved automatic couplers and air brakes; that they were all in good order and that an examination subsequent to the accident disclosed no defects in them. It was admitted that the two cars that came uncoupled belonged to another road.

At the close of plaintiff's case and also after all the evidence had been heard, the defendant asked an instruction directing the jury to return a verdict in its favor, both of which the court refused. This action of the court is assigned as error. As defendant's evidence did not tend to strengthen plaintiff's showing, it will only be necessary to consider whether under all the evidence plaintiff was entitled to recover.

The law is that a railroad company engaged in the carriage of passengers, "is required so far as it is capable by human care and foresight to carry them safely, and it is responsible for all injuries to its passengers from even the slightest negligence on its part."

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And, "when a passenger suffers injuries received in the breaking down or overturning of the coach in which he is riding, a prima facie presumption arises that such casualty was caused by negligence on the part of the carrier, and the burden is on the latter to repel such presumption and to show that the injury was the result of inevitable accident or some cause which human precaution and foresight could not have averted." Clark v. Railway, 127 Mo. 197; Furnish v. Railway, 102 Mo. 438.

The defendant contends that the uncontradicted evidence of its employees to the effect that upon inspection after the occurrence in question it was found that both the air brake and coupling were in good condition, overturned plaintiff's prima facie case, and that the jury should have been so instructed. In Gannon v. Gas, 145 Mo. 502, the holding was: "The plaintiff is entitled to have the jury determine the credibility of the testimony offered, even though he offer nothing to contradict that of defendant. Nor can the court assume as a matter of law that the testimony is true, satisfactory or convincing to the jury simply because no one by words contradicts what has been uttered." But the decision in that case seems to be, if accepted in its broadest sense, in conflict with other decisions of the Supreme Court and the Courts of Appeal. Downey v. Railway, 94 Mo. App. 137; Glasscock v. Railway, 82 Mo. App. 146; Hite v. Railway, 130 Mo. 140; May v. Crawford, 150 Mo. 527. But we do not think it material whichever way the rule may be so far as this case is concerned. It is true, there were no witnesses called by the plaintiff to contradict defendant's evidence that the air brakes and coupling were in good order upon inspection; but there were circumstances that tended to contradict such evidence— or, rather, the circumstances developed by plaintiff's testimony did not accord with defendant's evidence, and which created an issue as to the credibility of witnesses—in that the automatic coupling in ques-

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tion as shown by the testimony is a contrivance almost universally adopted by railroad companies for security and safety; and its merits are so highly esteemed that the congress of the United States has required that they be used by all companies doing an interstate business. It being one of the most secure and safe appliances known, it seems strange to the ordinary mind that it should have uncoupled twice in the same vicinity and in so short a time if it was in good working order and without any observable defects. That such a coupling would become detached at times and without any apparant cause, may have been true but that it could frequently do so if properly inspected and kept in repair and good working order is incredible. It would belie its reputation. And the jury after having inspected the coupling, heard it described and how it operated, might well have hesitated in believing the testimony of defendant's witnesses as to its unreliability. And notwithstanding that brakeman Gott testified that after the breaking apart of the train he could see nothing wrong about the coupling, this did not preclude plaintiff, even though Gott was his witness, from having his case submitted to the jury if other evidence justified. A party to a suit is not estopped from showing or relying on a different state of facts from those detailed by his witness.

Instruction number one asked by defendant and refused by the court was to the effect that if plaintiff after entering the car was furnished with a seat and voluntarily left it and was standing when thrown down by the jar, and that his so standing contributed to his injury, he could not recover. This instruction was properly refused. It is true plaintiff was provided with a seat when he entered the car, but he afterwards got up and went into the baggage department of the car and when he returned someone had taken his seat; and as there was none other unoccupied he was compelled to stand. It is hardly necessary to offer any reason to

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satisfy ordinary intelligence that a passenger has the right to leave his seat in a railroad car temporarily for any legitimate purpose, provided he does not expose himself to danger thereby.

Defendant's instruction number two, also refused, was as follows: "If you believe from the evidence that defendant's cars were equipped with automatic couplers and such were in good order, and that the train was equipped with air brakes and they were in good order, and that no defects could be discovered in either the brakes or the couplers by careful examination, and that cars of the kind do become uncoupled when handled in the manner that the cars in question were, and that these cars became uncoupled without apparant cause, or discoverable defect, then the defendant is not liable," etc. The plaintiff urges that this action of the court was justified upon the ground that the evidence tended to show that the platform of the cars that became detached were of unequal height, which might have accounted for their becoming uncoupled. Without entering into a discussion as to whether a railroad carrier would be justified in refusing to receive the cars of another carrier because of a difference in their height, respectively, we are of the opinion that the instruction in its scope would not only include that circumstance but every other that would go to show negligence. The words, "and that these cars became uncoupled without apparent cause or discoverable defect," imposes the burden upon the defendant in its most comprehensive language to disprove every kind of negligence.

Instruction number three was rightfully refused. It is as follows: "Although you may believe from the evidence that the train in question broke into, and that the two parts thereof collided and caused a jar or concussion, yet if such jar or concussion was not greater than the jars or concussions usually incident to the operation of mixed trains, then the plaintiff must be held to have assumed the risk of such jar or concussion, and

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the defendant is not liable,'' etc. In the one instance the risk would be assumed but it does not necessarily follow that because the jar or concussion are of equal force in both instances that the rule governing one should be applied to both. It is not the magnitude or the insignificance of the cause that produces the injury, which regulates the liability; but want of care.

Other instructions given at the instance of plaintiff are unobjectionable. Those given by the court on its own motion seem proper—if not they are not subject to attack as no exceptions were made to them at the time.

Respondent insists that the appeal should be dismissed for the reason that the affidavit for an appeal is not found in the record. It is true that the affidavit is not in the abstract before the court, but a copy of the record entry of the court recites that an affidavit for an appeal had been filed and a copy of the entry recites that an appeal had been allowed. The recitation of the record that such an affidavit was filed raises the presumption at least that it had been; and in the absence of a showing to the contrary, the presumption is conclusive.

For the error in refusing said instruction number two, the cause is reversed and remanded. All concur.

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# CASES DETERMINED

BY THE

## ST. LOUIS AND THE KANSAS CITY

# COURTS OF APPEALS

AT THE

## MARCH TERM, 1904.

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## T. M. YORK, Respondent, v. THE FARMERS BANK OF GARDEN CITY, Appellant.

**Kansas City Court of Appeals, March 7, 1904.**

1. **TRIAL PRACTICE: Pleading: Cause of Action: Recovery.** One can not sue on one cause of action and recover on another.

2. **MONEY HAD AND RECEIVED: Action for.** A petition is held to state an action for money had and received; such action lies when one receives money for the use of another and neglects to turn it over upon demand; and it is immaterial how the money came into the defendant's hands.

3. **———: Pleading: Instructions: Conversion.** The instructions set out in the opinion are held to submit the cause on the theory presented in plaintiff's petition and not as an action for conversion; and the mere fact that the jury were required to find the market value of certain mules was an unnecessary imposition on the plaintiff and defendant can not complain thereof.

4. **———: Reasonable Value: Proceeds of Sale.** Where an action is brought against a bank to recover the amount of certain checks taken by plaintiff for mules sold a stock dealer who has deposited the proceeds of two car loads with the bank, which proceeds equal or exceed the purchase price of all the stock, the plaintiff does have to prove the reasonable value of his mules, but is entitled to recover the purchase price.



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5. ———: **Interest: Instructions.** The plaintiff suing for money had and received is entitled to recover interest from the date of his demand; and section 2869, Revised Statutes 1899, applies to actions *ex delicto*.

6. **TRIAL PRACTICE: Instructions.** Refusal to give an instruction which is included in other given instructions is no ground for complaint.

7. **CORPORATIONS: Ultra Vires: Executed Contract.** Where a contract with a corporation is executed by the other party the corporation will not be permitted to plead *ultra vires*, unless its charter makes such excess void or the agreement was against public policy and good morals.

7. **MONEY HAD AND RECEIVED: Evidence: Reversal.** *Held* there was sufficient evidence to send the case to the jury and the admission of irrelevant testimony was not of such material character as to justify a reversal since it could not have influenced the jury.

Appeal from Cass Circuit Court.—*Hon. Wm. L. Jarrott,* Judge.

AFFIRMED.

*A. L. Graves* and *A. A. Whitsitt* for appellant.

(1) The law is well settled in this State that pleadings shall be strictly construed against the pleader. Snyder v. Free, 114 Mo. 367; Overton v. Overton, 131 Mo. 566; Young v. Schofield, 132 Mo. 661; Bales v. Bennington, 141 Mo. 581; Sidway v. Railway, 163 Mo. 372. (2) It is equally true that the plaintiff is bound by the allegations of his petition. Bruce v. Sims, 34 Mo. 251; Speck v. Riggins, 40 Mo. 406; Bank v. Armstrong, 62 Mo. 65; Chapman v. Callahan, 66 Mo. 312; Dorman v. Publishing Co., 70 Mo. 175; Kuhn v. Weil, 73 Mo. 215; Weil v. Poster, 77 Mo. 287; Wilson v. Albert, 89 Mo. 546; Bensieck v. Cook, 110 Mo. 182. (3) An action can not be brought on one cause of action and recovery had on another. Clements v. Yeates, 69 Mo. 623, and cases cited; Sanders v. Karl-

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wood, 79 Mo. 278; Finlay v. Beyson, 84 Mo. 664; Jones v. Loomis, 19 Mo. App. 234; Johnson v. Bank, 116 Mo. 558; Rippee v. Railway, 71 Mo. App. 557; Crother v. Acock, 43 Mo. App. 318; Trimble v. Stewart, etc., 35 Mo. App. 541; Fisher v. Realty Co., 159 Mo. 562; Raming v. Railway, 157 Mo. 477; Cole v. Armour, 154 Mo. 333; Huston v. Taylor, 140 Mo. 252. (4) If, however, the intention was to establish a parol trust as to personalty by oral testimony, then the rule is that the evidence must be clear in regard to the subject-matter and purposes of the trust, and the person or persons who are to take the beneficial interest. The evidence in this case falls short of measuring up to the above standard. Huetteman v. Viesselmann, 48 Mo. App. 582; Cramer v. McCaughey, 11 Mo. App. 426; Childs v. Cemetery, 4 Mo. App. 74; Deal v. Bank, 79 Mo. App. 262. (5) Instructions Nos. 1, 2, 3 and 8 given for the plaintiff, being based on a cause of action for conversion of the stock, even if the petition alleged conversion of the stock, and the evidence sustained the allegations of the petition, are erroneous, in that they peremptorily told the jury if they found for the plaintiff they would allow him interest on the amount so found from date of demand. The question of allowing interest was one of the discretion of the jury, not the court, and for this error, the cause should be reversed. R. S. 1899, sec. 2869; State ex rel. Hope, 121 Mo. 36; Carson v. Smith, 133 Mo. 606; Hawkins v. Brick Co., 63 Mo. App. 64; Vermillian v. LeClare, 89 Mo. App. 55; Wheeler v. McDonald, 77 Mo. App. 213; Eagle Co. v. Railway, 71 Mo. App. 626. (6) The instructions in this case, defining the measure of damages to be recovered, show that recovery was sought and had on cause of action for conversion of the stock. Carter v. Feland, 17 Mo. 283; Hendricks v. Evans, 46 Mo. App. 313; Baker v. Railway, 52 Mo. App. 602; Mfg. Co. v. Huff, 62 Mo. App. 124; Spencer v. Vance, 57 Mo. App. 427; Vaughn v. Fisher, 32 Mo. App. 29.



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*C. W. Hight* and *T. N. Haynes* for plaintiff.

(1) The evidence shows that defendant received the money which justly belonged to plaintiff and refused to pay it over after demand; the petition so states, and whether the action be designated one for money had and received, or conversion, it is sufficient. Johnson-Brinkman Co. v. Bank, 116 Mo. 558; Antonelli v. Basile, 93 Mo. App. 138; Richardson v. Drug Co., 92 Mo. App. 515; Railway v. McLiney, 62 Mo. App. 166; Deal v. Bank, 79 Mo. App. 262; Jacoby v. O'Hearne, 32 Mo. App. 566; Robbins v. Ins. Co., 12 Mo. 380; Maxwell on Code Pleading, p. 247; 4 Wait's Actions and Defenses, 469; R. S. 1899, sec. 539. (2) The petition states a good cause of action for money had and received and under the evidence this is the proper remedy. Johnson-Brinkman Co. v. Bank, 116 Mo. 558; Richardson v. Drug Co., 92 Mo. App. 515; Antonelli v. Basile, 93 Mo. App. 138; Deal v. Bank, 79 Mo. App. 262; Maxwell on Code Pleading, p. 247; 4 Wait's Actions and Defenses, 469. (3) The terms of the sale to plaintiff and his assignors being cash on delivery, and no cash having been paid, no title passed to Hord, and the latter could convey no title either in the stock or the proceeds, to anyone else. Johnson-Brinkman v. Bank, 116 Mo. 558; Railroad v. McLiney, 32 Mo. App. 166; Bank v. Railroad, 46 N. W. (Minn.) 342; Benjamin on Sales, sec. 731; 2 Parsons on Contracts (7 Ed.), 624; Woodburn v. Woodburn, 115 Ill. 427; Hodgson v. Barrett, 33 Ohio St. 63. (4) There was no agreement that the checks should be received as absolute payment, and there is no presumption that they were so received. Johnson-Brinkman Co. v. Bank, 116 Mo. 558; see, also, cases cited under proposition 3. Defendant failed to apply the money placed in its hands for the use of the holders of these checks as it, by an implied contract and as we claim by specific contract, agreed to do, hence it is liable for interest on amount due from date of demand and it was

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not error to so instruct the jury. Padley v. Catterlin, 64 Mo. App. 648; Lachner Bros. v. Express Co., 72 Mo. App. 21; Goodman v. Railway, 71 Mo. App. 464. (5) Defendant had the use of plaintiff's money and deprived plaintiff of use of it, hence it is proper to allow interest. Padley v. Catterlin, 64 Mo. App. 648. The statute 1899, section 2869, cited by defendant applies only to actions *ex delicto,* and has no application to this class of cases. Padley v. Catterlin, 64 Mo. App. 648; Goodman v. Railway, 71 Mo. App. 464.

SMITH, P. J.—The petition is in three counts, in the first of which it is stated that the plaintiff was the owner and entitled to the possession of eight mules which were shipped by A. F. Hord from Harrisonville and consigned to McFarlane-Evans Co., East St. Louis, and by that company sold and the proceeds arising from such sale, amounting to $950, were received by defendant, an incorporated bank, located at Garden City, in Cass county; that the defendant knew at the time of the receipt of such proceeds that the plaintiff was entitled thereto and that the plaintiff had demanded of defendant the payment of such proceeds, which the latter had refused. The facts stated in the second and third, except as to parties, animals and amount for which they were sold, are very much the same as those stated in the first. It was further stated in said second and third, however, that the plaintiff had acquired by assignment the causes of action therein stated, and had a right of action therein. The answer was a general denial.

The evidence tended to establish about these facts, viz.: That said Hord, a trader in live stock, resided in the vicinity of where said defendant bank was located and though without any capital of his own was by the assistance of defendant enabled to carry on a rather extensive trade in live stock. During the twelve months preceding the transaction which gave rise to this action

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his business with defendant had amounted to something like seventy thousand dollars. Under an arrangement with defendant he carried on his trading operations in about this way: He would purchase here and there horses, mules or other stock giving his check on defendant therefor and making on each check the kind of stock for which it was given. These checks would be paid by defendant and when one or more carloads of such stock was purchased and ready for shipment he would draw a sight draft on the commission merchant to whom the stock was consigned and in this way cover the checks which he had given the persons from whom he had made his purchases. Further evidence was adduced which tended to show that along early in January, 1903, it was discovered by defendant that Hord had not been successful in his trading and that the aggregate amount of his checks exceeded his drafts and that he was behind with defendant to a considerable amount. The defendant became restless and uneasy and began to look about to see how it could best even up its account with Hord who, in the meantime, carried on his trading operations without serious interfernce, giving his checks and drafts as he had been accustomed to do.

On January 9, 1903, the defendant's cashier, Stevens, called Hord up by telephone at Archie and inquired how he had come out on his shipment made on the sixth, to which Hord answered that he had made money. Stevens then inquired when he was going to ship again, to which Hord answered that he had bought one horse that evening and was going to Butler, Adrian and Harrisonville to buy the rest. Hord in this telephone talk told Stevens that he would mail him a draft that day and when the shipment was complete he would make a draft for the *full amount of the cost of the horses.* Stevens responded, "all right." Hord then said: "You O. K. the checks I am giving and send me a check book. . . . I am going to buy horses and if any of the banks call you up you can tell them it's

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all right for these horses;" and to which Stevens replied: "Yes, sir." Stevens sent Hord the check book to Archie and the latter sent him a draft for $1,800 on McFarlane-Evans Co., with instructions, "to hold it until the two carloads of horses were made up and then he would made a draft for the full amount, when the former draft could be returned to him." On January 12, Stevens wrote Hord that, "your account is barely even since the $1,800 draft is in. Don't buy any more horses at this time than you can ship out clean."

On the same day, Hord answered the above letter saying that, "I will buy no more horses than I can ship out but please take care of these checks. I will wire draft Saturday in place of the one you hold. Will ship hogs tomorrow and will wire draft on them. . . . Please don't turn down my checks until I get this load off," etc.

On the fifteenth, Hord inclosed a letter which he had received from his commission merchant on which he wrote that the horses and mules he had been buying that week would make money and that he would ship out Saturday and wire him a draft. Hord went from Archie to Butler and Adrian where he bought horses and mules amounting to about $1,000, giving his checks for the purchase price. On the fourteenth he went to Harrisonville where he bought the eight mules of plaintiff and the horses of Williams and Haines, and these, with others purchased there, made up a car which with that purchased at Adrian he shipped on the seventeenth. The purchase price of plaintiff's mules was $950 and for which Hord gave his check on defendant. He also gave his check to the plaintiff's assignors for the price of each of the horses severally purchased of them. These checks were deposited in a Harrisonville bank for credit and by it sent to defendant for payment, which was refused.

When the two carloads of horses and mules were shipped, Hord telegraphed to Stevens to draw a draft

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on McFarlane-Evans Co. in his name for $3,700. The draft was accordingly drawn and paid. The mules brought $56 in excess of the amount of the draft which excess was sent to defendant for Hord's credit. The defendant, it seems, paid all of the checks given by Hord for the two carloads of horses and mules except those purchased of plaintiff and his assignors, Williams and Haines. The checks given the latter were not presented to defendant until after the draft for the $3,700 had been paid to it. The cost of the two carloads was approximately that of the draft, so that the proceeds of the sale received by the defendant was sufficient to cover all of the checks given for the purchase price of them. The plaintiff and his assignors sold their animals to Hord for cash. There is no pretense that they accepted the checks as so much cash. The defendant, it seems, did not apply the proceeds of the $3,700 draft, as he was directed by Hord, but applied it in part to other indebtedness of his to it.

At the conclusion of the evidence the court gave to the jury a number of instructions for both parties, and amongst those for plaintiff were the following:

"1. The court instructs the jury that if they believe from the evidence that plaintiff York on January 17, 1903, was the owner of and sold to A. F. Hord the live stock mentioned in first count in the petition; that said York received from said Hord his (Hord's) check for the same on defendant bank; that said transaction was a cash sale; and that there was no agreement between Hord and York that said check should be received as a cash payment; that said check was duly presented by said York to said defendant bank for payment, and payment thereof refused; that said check has not been paid; that said Hord sold and shipped said live stock to McFarlane-Evans Company of East St. Louis, Ill.; that said McFarlane-Evans Company paid to said Hord the purchase price for said live stock; that said Hord deposited or caused to be deposited the proceeds of such

sale in defendant bank; that the amount of said deposit was equal to or greater than the fair market value of the live stock in said shipment to McFarlane-Evans Co.; that said defendant bank at the time it received such deposit knew or had reason to believe (as defined by other instructions) that the live stock so sold and shipped to said McFarlane-Evans Company had not been paid for by said Hord, then the title to said live stock mentioned in the first count of the petition, and the title to the proceeds of sale thereof did not pass to said Hord, but remained the property of said York, and if said defendant bank at the time it received the proceeds of the $3,700 draft (if said proceeds were so received) knew or had reason to believe that said draft was placed in defendant bank by said Hord with the intention that the proceeds should be used to pay the checks given by said Hord for the purchase of said shipment of live stock to McFarlane-Evans Company, and afterwards if said York or anyone for him, made a demand on said defendant bank for the reasonable market value (at time of such demand) of the live stock mentioned in said first count of petition, owned by him as aforesaid, and that said defendant bank refused to pay to said plaintiff such value of such live stock, then your verdict should be for plaintiff on the first count in petition contained, in an amount not exceeding the sum of $950 together with interest on amount so found from date of such demand at the rate of six per cent per annum.

"4. The jury are further instructed that direct and positive proof to defendant bank of the fact that at the time said bank received the proceeds of said draft from McFarlane-Evans Company that said bank knew or had reason to believe that the live stock so sold and shipped to McFarlane-Evans Company had not been paid for by said Hord, is not necessary, but the jury are entitled to take into consideration all the facts and circumstances and the previous course of dealing be-

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tween defendant bank and said A. F. Hord, and therefrom find that the bank had such notice, if they believe that such facts and circumstances and such previous course of dealing fairly warrant the inference of such notice; and if such facts and circumstances and previous course of dealing were sufficient to put a person of ordinary prudence and caution on inquiry, then that amounts to notice.

"5. The court instructs the jury that if they believe from the evidence that the defendant bank, the Farmers' Bank of Garden City, at the time it received the draft on McFarlane-Evans Company, of East St. Louis, Illinois (if you find it received such draft) from said A. F. Hord, knew or had reason to believe that said draft was placed in defendant bank by said Hord with the intention that the proceeds should be used to pay the checks given by said Hord in the purchase of said shipment of live stock to said McFarlane-Evans Company, then the defendant bank had no right to appropriate the proceeds of said draft to any other purpose than to the payment of such checks, and in determining whether or not the bank had such knowledge or belief, you will take into consideration all the facts and circumstances detailed in evidence, including the previous course of dealing between the said defendant bank and said A. F. Hord.

"6. The jury are further instructed that direct and positive proof to defendant bank of the purpose for which said A. F. Hord deposited the McFarlane-Evans Company draft is not necessary, but the jury are entitled to take into consideration all the facts and circumstances and the previous course of dealing between the bank and said A. F. Hord, and therefrom find that the bank had such notice, if they believe that such facts and circumstances and such previous course of dealing fairly warrant the inference of such notice; and if such facts and circumstances and previous course of dealing were sufficient to have put a person of ordinary pru-

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dence and caution on inquiry, then that amounts to notice.

"7. With reference to the checks given to plaintiff, Haines and Williams, by said Hord for live stock, the court instructs the jury that if at the time of giving said checks there was no agreement between plaintiff, Haines and Williams and said A. F. Hord that said checks should be taken by plaintiff, Haines and Williams as payment, whether they were paid or not, then the giving of said checks was not a payment, unless the checks were afterwards paid."

The plaintiff's second and third are based on the second and third counts of the petition and are similar in expression to the first.

The defendant assails the judgment on the ground that the cause of action stated in the petition is that for money had and received, while the instructions already quoted submitted it on the theory of a conversion, and therefore the petition states one cause of action and the recovery was had on another. The general rule is well established in this State that a party can not sue upon one cause of action and recover upon another. Clements v. Yeates, 69 Mo. 623, and cases cited in defendant's breif. Doubtless, the petition contains several redundant and superfluous allegations; but when stripped of these it sufficiently states a cause of action for money had and received for the use and benefit of the plaintiff. *Utile, per inutile non vitiatur.* The law is, when a person who has received money for the use of another neglects or refuses to pay it over to his *cestui que trust,* the person entitled thereto may maintain an action against him for money had and received. And it is of no importance how the money came into his hands if the plaintiff is legally entitled thereto. Johnson v. Bank, 116 Mo. 558; Richardson v. Drug Co., 92 Mo. App. 515; Antonelli v. Basile, 93 Mo. App. 138; Deal v. Bank, 79 Mo. App. 262. And in Clark v. Bank, 57 Mo. App.

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l. c. 286, it was said: "By the well-settled doctrine of equity a constructive trust arises whenever one party has obtained money which does not equitably belong to him and which he can not in good conscience retain or withhold from another who is beneficially entitled to it, as for example, as when money has been acquired through breach of trust or violation of a fiduciary duty, and the like. Pomeroy's Equity, sec. 1047. In Johnson v. Payne & Williams Bank, 56 Mo. App. 257, it is stated to be a rule deducible from many authorities, that a bank can not use a deposit to pay the individual debt of the depositor due it when it when it has knowledge that the deposit is held by the depositor in a fiduciary capacity and does not belong to him personally."

We can not uphold the defendant's contention that the theory on which the plaintiff's instructions submitted the case was variant from that of the petition. Before the jury were authorized by the plaintiff's first instruction to return a verdict for him it was required to find from the evidence the reasonable market value of plaintiff's mules at the time of the demand for payment of the check. This was the imposition of a burden on plaintiff which the law did not require in order to entitle him to recover, but its imposition could in no way prejudice the defendant. If the other facts hypothesized in the instruction were found for plaintiff he was entitled to recover and this without departing from the theory of the first count of his petition.

It is true, the evidence does not show the amount for which plaintiff's mules were sold on the market by Hord's commission company, but it does show that the two carloads of horses and mules purchased by Hord and shipped on the 17th of January, and in which shipment plaintiff's mules were included, cost him—Hord—approximately $3,700 and that the same were sold on the market by his commission company for an amount in excess of that and that the draft for a like amount—$3,700—was given to and collected by defendant and was

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for that much of the proceeds of said sale. It is thus seen that the amount of the proceeds of the sale traced into defendant's coffers equalled the aggregate of all the checks which were given by Hord for the purchase price. This amount was sufficient to pay each one of such checks in full and as plaintiff's check was one of them he was entitled to have it paid out of the fund. If the amount of the fund so received had been insufficient to pay all of them, then it would have been necessary for plaintiff to show the price for which his mules sold, otherwise it would have been impossible to determine what proportion of the fund he was entitled to receive.

We are unable to yield our assent to the defendant's contention that the plaintiff's instructions, or any of them, submitted the case to the jury on the theory of a wrongful conversion. If the defendant received the fund with notice to whom it belonged or for whose use and benefit, and then refused to pay it over to those entitled thereto, it was guilty of conversion. But even if it had wrongfully converted the fund to its own use, this did not relieve it from liability in an action for money had and received. The action for money had and received can be maintained irrespective of whether it is maintainable as an action of trover and conversion. Johnson v. Bank, supra; Antonelli v. Baselle, supra.

The defendant further contends that the court erred in telling the jury, as it did by the giving of plaintiff's instructions, that if it found for him to allow interest on the amount so found from the date of the demand at the rate of six per cent per annum. This was a correct expression of the rule in cases of this kind, In Padley v. Catterlin, 64 Mo. App. l. c. 629, a similar question was examined and passed upon adversely to the defendant's contention here. And a like ruling was made by us in the latter case of Goodman v. Railway, 71 Mo. App. 460. There is nothing in Carson v. Smith, 133 Mo. l. c. 617, that in any way militates against the

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rule announced by us in the two cases just cited. The latter are actions for the "wrongful and willful taking and converting to their own use" of a stock of merchandise, and the statutory rule as to the allowance of interest applied in a case of that kind can have no application to one like this for money had and received. The statute, section 2869, Revised Statutes, has no application to actions *ex contractu* but to those in form *ex delicto*.

The defendant complains of the action of the court in refusing its thirteenth instruction. While it is somewhat unintelligible and wanting in clearness of expression, we think it is substantially the same as its number ten, which was given; and therefore the action of the court in that respect affords no just ground for complaint.

The defendant objects that the court erred in refusing its fourteenth which told the jury to disregard any and all testimony tending to establish a contract between it through its cashier and Hord, permitting the latter to overdraw his account. The defendant had previously objected to the introduction of the evidence tending to prove the contract and arrangement between its cashier and Hord, whereby the former was to pay the latter's overdraft for stock purchased, and the latter was to cover such overdrafts by posting his draft on his commission company to whom the stock so purchased was shipped. The objection thus raised was that the bank in entering into such an arrangement exceeded its power—that such an arrangement was *ultra vires* the corporation. The defendant bank, it is admitted, was a banking corporation organized and existing under the statutes of this State.

It will have been seen that the contract or arrangement between the bank and Hord was executed so far as the latter was concerned. He drew the checks for the stock purchased and shipped and after such shipment gave defendant his draft on his commission company

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for an amount amply sufficient to cover the checks so drawn on defendant. The defendant's objections are fully answered by what is said in City of Goodland v. Bank, 74 Mo. App. 365. In that case the authorities are fully cited and reviewed and the conclusion reached that, "where the act is not wrong *per se,* where the contract is for a lawful purpose in itself, as in the present case, and has been entered into in good faith and fairly executed by the party who seeks to enforce it, we must assent to the doctrine of those authorities which hold that the excess of the corporate powers of the contracting party which has received the benefit of the contract is an unconscionable defense which may not be set up to exempt from liability the party pleading it." And in the same case it was further held that, a violation of a charter can not be taken advantage of collaterally or incidentally but only on a direct proceeding instituted for that purpose. And it was further held in that opinion that in a collateral proceeding to declare acts of a trading corporation void it must be shown to be the intention of the charter, as gathered from its terms, not only to restrict the business of the corporation to certain things, but in addition to declare that when it exceeds these restrictions the act should be void. If such intention does not exist in the charter the State alone can question such acts as *ultra vires* except when the contract is against public policy and good morals. The contract or arrangement here was not *malum in se* or *malum prohibitum,* but was unauthorized by defendant's charter—the statute. It is clear from the authorities cited in the case we have just quoted from that the defendant entered into a contract or agreement that was in excess of its charter powers (article 8, chapter 12, Revised Statutes) and that the contract and arrangement was executed by the other contracting party, and therefore an enlightened public policy requires that such contract and arrangement be upheld and enforced, rather than evaded.

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It is true that Hord is not suing on the contract and arrangement in issue, still, we think the plaintiff is sufficiently in privity with him to enforce a liability of defendant resulting from such contract and arrangement; and nothing is seen in Johnson v. Bank, 173 Mo. 153, at variance with what we have just stated the law to be as applicable to the present case. In the case just cited the powers of national banks as derived from the Federal statute under which they are created, are discussed. In the course of the opinion it is stated that, "it will be of no profit in this case to consider the rules of law adopted by the several States bearing upon the power of banks organized by authority other than by the Federal government to enter into such contracts or to interpose the defense of *ultra vires* after the other party to the contract has performed it." It results that whatever is said in that case relates to the powers of national banks under the Federal statutes and not to those organized under the laws of a State.

The defendant still further complains that its instruction in the nature of a demurrer to the evidence should have been sustained. The facts which the evidence tends to show, and to some of which we have made reference at the beginning, we think fully justified the submission of the case to the jury.

As said in Johnson v. Bank, supra, "there was much irrelevant testimony introduced by plaintiff over the objections of defendant, but none of it was of such materiality as to justify a reversal on that ground, as it could not possibly have had any influence on the jury in making its verdict."

The judgment which was for plaintiff will accordingly be affirmed. All concur.

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R. J. ORMSBY, Respondent, v. LACLEDE FARMERS' MUTUAL FIRE AND LIGHTNING INSURANCE COMPANY, Appellant.

**Kansas City Court of Appeals, March 7, 1904.**

**INSURANCE: Representations: Warranties: Agents Filling Out Application. Where the agent secures the insured to sign a blank application and he fills out the blanks therein, and though the insured afterwards signed the same without knowing what they were, such statements become those of the insurer and he is estopped to claim them as warranties.**

Appeal from Linn Circuit Court.—*Hon. J. P. Butler*, Judge.

AFFIRMED.

*O. F. Libby* and *Harry K. West* for appellant.

(1) Defendant asked but one instruction, which was a peremptory instruction to find for the defendant. This instruction should have been given. The defendant is a Farmers' Mutual Fire and Lightning Insurance Company incorporated under article 10 of chapter 119, Revised Statutes of Missouri, 1899. Being a corporation so organized and existing, it is exempt from the provisions of chapter 119, applicable to general insurance companies. This exemption is in express words in section 8079. This being true, sections 7973, 7974, 7975 and 7976 do not apply to the contract of insurance sued on in this case. (2) Our sole contention on this branch of the case is that the contract of insurance in this case makes the statement contained in the application warranties and that companies of this kind are exempt from the provisions of the statute which construes them to be representations only.

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These being warranties, and one of the warranties being broken, the policy is forfeited, no matter whether the warranty be material or not. 16 A. & E. E. of Law (2 Ed.), p. 920; Insurance Co. v. Barnett, 73 Mo. 364; Aloe v. Insurance Co., 147 Mo. 561; Joyce on Insurance, sec. 1962; Warren v. Insurance Co., 72 Mo. App. 188; Gibson v. Insurance Co., 82 Mo. App. 515.

*C. C. Bigger* for respondent.

(1) The undisputed evidence, in this record, shows that plaintiff signed the application for the policy sued on, in blank, and that it was afterwards filled up, in the absence of plaintiff, by H. E. Maybee, secretary of the defendant, who was also its soliciting agent, without direction or information from plaintiff, and further, that plaintiff, at no time, had any knowledge of its contents. This being true, the defendant is now estopped to dispute the truth of the statements and representations contained in the application. Shell v. Insurance Co., 60 Mo. App. 644; Cagle v. Insurance Co., 78 Mo. App. 431; Rickey v. Insurance Co., 79 Mo. App. 485; Montgomery v. Insurance Co., 80 Mo. App. 500; Rissler v. Insurance Co., 150 Mo. 366; Langford v. Insurance Co., 97 Mo. App. 79. (2) It is also shown by the undisputed evidence in this record, that at and prior to the time when the application was signed in blank by plaintiff, and thereafter filled up by defendant's secretary, who solicited the insurance and issued the policy, that plaintiff had fully informed defendant's said secretary of the incumbrance on the premises, and with this knowledge, on the part of the secretary, the policy was issued. This constituted a complete waiver of said alleged breach. Authorities supra. Ormsby v. Insurance Co., 72 S. W. 139.

ELLISON, J.—This is an action on a fire insurance policy. The judgment was for plaintiff. The

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cause was here on another occasion and will be found reported in 98 Mo. App. 371. It was there reversed and remanded on account of errors in instructions for the plaintiff. It was again tried and errors before pointed out were avoided. At the last trial the only witness was the plaintiff himself. The other evidence for plaintiff consisted of the policy. Defendant only introduced the application and the defendant's by-laws, and its only instructions offered were demurrers, one at the close of the case for plaintiff and one at the final close. Both were refused. These demurrers conceded the truth of plaintiff's testimony.

The defense is not an attack upon the truth of the testimony, but its sufficiency to sustain the judgment. Defendant insists that its demurrers should have been given on the ground that plaintiff by his application stated that he had not had any fire previous to the present policy and that he warranted such statement to be true. Defendant insists that the warranty is binding absolutely, whether material to the risk or not. That the statute, sections 7973-7976, Revised Statutes 1899, which makes of warranties mere representations, unless they are material to the risk, does not apply to farmers' mutual companies. Section 8079. It is not necessary, in this case, to discuss or decide that proposition. The reason is this. It appears without dispute that defendant's agent who procured the insurance and who took the application had plaintiff to sign it in blank and leave it with him. That he then afterwards himself filled it out. That the statements now relied upon by defendant as warranties to defeat the policy were not plaintiff's statements, but were those of the agent. That although he signed the application as afterwards presented to him by the agent he had nothing to do with the statements therein contained and did not know what they were. These facts make the statements in the application the statements of the de-



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fendant itself and not this plaintiff, and it is estopped to claim them as warranties. Ins. Co. v. Wilkinson, 13 Wall. 222; Rowley v. Ins. Co., 36 N. Y. 550. We made a decision to the same effect in Thomas v. Ins. Co. 20 Mo. App. 150 and in Shell v. Ins. Co., 60 Mo. App. 644. And so did the Supreme Court in Combs v. Ins. Co., 43 Mo. 148, and other cases.

So, in point of fact, the ground upon which defendant asked its peremptory instruction is without support.

The judgment being manifestly for the right party, and as no other judgment could have been rendered on the facts shown, it will be affirmed. All concur.

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## CASSVILLE ROLLER MILLING CO., Respondent, v. THE AETNA INSURANCE CO., Appellant.

**Kansas City Court of Appeals, March 7, 1904.**

1. **INSURANCE: Principal and Agent: Corporations.** *Held,* on the facts in this case that the agent of an insurance company, and the president of a milling corporation in issuing and taking out a policy on the mill bound their principals; that the policy was delivered and accepted and valid though the premium was not wholly paid; and the policy continued in force to the date of the loss notwithstanding an attempted cancellation by the insurance company without notice to the milling corporation.

2. ———: ———: ———: **Loss: Claim.** *Held,* after the loss no option the milling corporation could exercise could affect the validity or invalidity of its claim.

3. ———: ———: **Return of Premium Paid: Compromise.** After the loss the return of the part of the premium paid and its retention by the president of the milling corporation for a time did not operate as a compromise since such an agreement must be understandingly made.

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4. ——: ——: **Corporations: Loss: Power of President.** After the loss the president of the milling corporation, though its general agent, had no power to give away the damages that accrued to the corporation.

5. ——: ——: ——: **Tender: Deposit.** The tender of a certificate of deposit if not objected to may be a valid tender, but the tender must be made to the party and a mere deposit in the bank in the name of the party is not a tender.

6. ——: ——: ——: **Power of President: Return of Premium: Tender Back.** After the loss on the policy the president of the milling corporation had no authority to receive back the premium paid for the insurance; and consequently there was no necessity for his tendering the return of same to the insurance company.

Appeal from Dade Circuit Court.—*Hon. H. C. Timmonds,* Judge.

AFFIRMED.

*Fyke Bros., Snider & Richardson* and *George & Landis* for appellant.

(1) Mr. Reynolds, general manager of and for the mill company, through whose hands all its business passed, and who looked after its insurance matters, as he did all other business transactions, was clothed with authority to legally represent it in the transactions out of which this suit grew, and his acts in those transactions, were the acts of the mill company, valid and binding upon it. Gentry v. Ins. Co., 15 Mo. App. 215; Breckenridge v. Ins. Co., 87 Mo. 62; Rice v. Groffman, 56 Mo. 434; McNichols v. Nelson, 45 Mo. App. 446; Nicholson v. Golden, 27 Mo. App. 132; Sharp v. Knox, 48 Mo. App. 169; Ruggles v. Washington Co., 3 Mo. 496; Nichols v. Kern, 32 Mo. App. 1; Bank v. Lumber Co., 54 Mo. App. 327; Silver v. Railway, 5 Mo. App. 381, 72 Mo. 194. (2) Even if the policy of insurance sued on had not, by the company's effort to cancel the same been deprived of all life, notwithstanding, the company in its

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own person supposed and claimed it had been legally cancelled, then it stood, by reason of the defendants having failed to give the specified notice (if it was required in this instance), and its failure to refund such of the premium as had been paid, void or enforcible at plaintiff's option. Hopkins v. Ins. Co., 78 Iowa 344; Kerby v. Ins. Co., 13 Lea 340; McCullom v. Ins. Co., 61 Mo. App. 352. (3) The policy in suit being enforcible or void April 14, 1902 (the date of the loss), at plaintiff's option, its election in the matter determined the rights and obligations of both parties. Laundry v. Ins. Co., 151 Mo. 90; Bernard v. Ins. Co., 38 Mo. App. 106; Wilson v. Ins. Co., 5 N. E. 818; McCullom v. Ins. Co., 61 Mo. App. 352; Okey v. Ins. Co., 29 Mo. App. 105; LaForce v. Ins. Co., 43 Mo. App. 518; Horowitz v. Ins. Co., 40 Mo. 557; Frink v. Ins. Co., 66 Mo. App. 513. (4) Its acceptance of that part of the premium which had been paid, when returned by defendant's agent; understanding the policy had been cancelled, or that defendant claimed it had been cancelled, was an act contradicting and inconsistent with an intention to enforce the policy, and by it plaintiff became estopped from insisting that the contract be enforced. Laundry Co. v. Ins. Co., 151 Mo. 90; McCullom v. Ins. Co., 61 Mo. App. 352.

*Davis & Steele* and *E. P. Mann* for respondent.

(1) The position maintained by respondent in the trial court and the main ground upon which the court set aside the nonsuit is, that the policy being in full force and effect at the date of the fire, the policy could not have then been cancelled, the only thing they could legally do in this case at that time was a settlement of the loss or an adjustment thereof, which was not attempted. The effect of a cancellation is to relieve the insurer from any future liability on the policy, but it does not reach back and absolve the company from any

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liability which it may have already incurred. If the subject-matter of the contract has already been destroyed by the cause insured against, at the time when the cancellation is effected, the insurer is not discharged from liability thereby. 16 Ency. of Law (2 Ed.), 876. (2) A contract of insurance is a contract to pay liabilities and the cause of action is complete when the liability attaches. Locke v. Homer, 131 Mass. 93; Thompson v. Taylor, 30 Wis. 68; Trinity Church v. Higgins, 48 N. Y. 532; Maloney v. Nelson, 144 N. Y. 182. (3) It stands admitted by the record in this case that at the time of the fire the policy was valid and binding and the fire at once changed the obligation of the insurance company from a contingent to an actual liability, fixed and determined by the policy. The authorities are numerous that a debt can not be extinguished by the payment of a less amount even though both debtor and creditor may agree that the less amount shall be paid and received in full satisfaction of the debt. Gibbony v. Ins. Co., 48 Mo. App. 185; Riley v. Kershaw, 52 Mo. 224; Dry Goods Co. v. Goss, 65 Mo. App. 55; Griffith v. Stonebreaker, 61 Mo. App. 1; Clark v. Ins. Co., 35 L. R. A. 276; 2 Wood on Insurance, sec. 443; Summers v. Ins. Co., 45 Mo. App. 53; Ehrlich v. Ins. Co., 88 Mo. 249; Okey v. Ins. Co., 29 Mo. App. 105; Lee v. Hassett, 39 Mo. App. 67; Marchildon v. O'Hara, 52 Mo. App. 523. (4) The Cassville Roller Mill Co., after the fire, respondent admits and appellant contends or asserts, was insolvent before the fire. Either contention being true, then Mr. Reynolds (the manager) would have no power or authority to release a debt of $1,500, due from appellant, for the mere pittance of $36; and the corporation or creditors could pursue and recover the remainder. The funds, assets and property of insolvent corporations are trust funds for benefit of creditors. Brick Co. v. Schoenrich, 65 Mo. App. 283; 1 Morawetz on Private Corpora-

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tions, sec. 499; Webb & Co. v. Lumber Co., 68 Mo. App. 556; Gardner v. Ins. Co., 58 Mo. App. 611; McCartney v. Ins. Co., 45 Mo. App. 373; Rothschild v. Ins. Co., 74 Mo. 41; 16 Ency. Law (2 Ed.), 855.

ELLISON, J.—This action is based on a policy of fire insurance. At the close of the evidence, the trial court having intimated that a demurrer to plaintiff's case would be sustained, it took a nonsuit with a leave to set it aside. It did so move and the court sustained the motion, whereupon defendant appealed from the order.

Plaintiff is a corporation which owned and operated a flour mill. Its general manager was S. R. Reynolds who was likewise a director and stockholder. Defendant's agent at Cassville, where the mill was located, was C. D. Manley. Prior to February 19, 1902, plaintiff had been carrying a policy on the mill issued by defendant for $1,500. A few days prior to that date, Manley met Reynolds and reminded him that his policy would expire at that time and asked if he desired to renew it. Reynolds answered that he did, and Manley then said he would write it up. He did write it, and a few days after the 19th, Reynolds was in Manlay's office, after night, attending a meeting of the school board, when Manley said to him: "Here is that insurance policy written up for you," at the same time handing it to him, telling him it was a copy of the former one. Reynolds took it and "looked through it," and then said to Manley: "Charley, I don't want to take this to the mill; I will take it to the bank, I will stick it back here in a pigeonhole and take it down there; if I take it to the mill I will forget it." Manley said, "all right," and Reynolds said, "I just stuck it back." The premium was $75 and none of it was paid at this time, but shortly afterwards he met Manley on the street and paid him $20 and again, shortly after that, paid him $16.25. Reynolds never came back for the policy; and it seems that

on its issue being reported to the defendant company, it ordered it to be returned for cancellation and that Manley returned it to the company, whereupon the latter wrote across its face, "Cancelled and returned March 12, 1902." The policy, while giving the company power to cancel, required that the plaintiff should have five days' notice; and no notice was given, nor did Reynolds know that Manley had returned it. Four weeks thereafter, on April 12th, the mill burned at night. In the morning following, these men met in the postoffice and Manley said to Reynolds that his policy had been cancelled. The latter asked him why he had not informed him before, that he (Reynolds) had represented to the bank that he had $3,000 insurance and that this left him in a "peculiar condition." He then had Manley go with him to the bank and make it right there by explaining that Reynolds had not misrepresented matters to it, as he did not know of the cancellation. On the same day, but two or three hours later, Manley handed back to Reynolds the $36.25 premium money which had been paid him as already stated. Reynolds kept it a few days and then, on advice of one of the bank officers, he deposited it to Manley's credit and notified him of the deposit.

Plaintiff's reply admitted that the premium money was paid back to Reynolds, but that Reynolds did not know what it was for and that as soon as he found out he deposited it in bank for Manley. The reply also set up that Reynolds had no authority from plaintiff to accept the money. But in giving his testimony, which was the sole evidence in the case, aside from the documents, Reynolds stated that he did know what the money was for and that he kept it several days, and then only deposited it for Manley on advice of the bank.

From the foregoing facts there is no doubt that each of these agents represented and bound their principals up to the time of the loss as fully as if the actions recited had been performed by the principals themselves.

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There is no doubt, considering the former dealings between the parties, that when Manley handed Reynolds the policy at the school board meeting in his office and Reynolds accepted it and then put it back in Manley's desk so that he might afterwards go by and take it to the bank, there was a full and completed contract of insurance between them, so that, if nothing intervened to change that relation and a loss occurred, the defendant would have been liable therefor; and the fact that the premium had not been paid at that time would not affect the liability.

There is no doubt that although the company had the policy returned to its main office and had it indorsed as cancelled several weeks before the fire, yet, as plaintiff was not notified of the cancellation up to the time of the fire, and the premium it had afterwards paid was not returned to it, the policy continued to be a valid contract of indemnity, and defendant was liable to plaintiff at that time on the facts which then existed.

The question then is, did the facts transpiring after the fire relieve such liability? When the loss occurred defendant's theretofore contingent liability, in point of fact and law, became a fixed and determined liability. But defendant here interposes the suggestion that Manley was in good faith claiming that the policy had been returned to the company and cancelled on the 12th of March. That that being his claim, Reynolds, with full knowledge of the facts, accepted the return of the portion of the premium which he had paid. That plaintiff had a claim on the policy "void or enforcible at its option," and that it elected to treat it as void and accepted the return of the premium money. Defendant likens the situation of the parties to that where, on account of non-compliance with certain provisions, policies have become forfeited and the insurer afterwards does something, by way of waiver, which rehabilitates the policy, citing as illustrations, Laundry Company v. Ins. Co., 151 Mo. 90 and McCollum v. Ins. Co., 61

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Mo. App. 352. We do not think defendant's position is applicable to the case. The courts have refused to enforce forfeitures (which are ever regarded unfavorably) whenever it could be seen that the insurance company, in whose favor they are inserted in such contracts, had, itself, acted inconsistent with a desire to have them enforced. But no like situation is presented by this case. After the fire, plaintiff did not have a claim which was "void or enforcible at his option." It had a claim which was valid or invalid as it then existed. There was no option or election, as such, which plaintiff could exercise that would, in any way, effect the validity or invalidity of its claim. If it had a valid claim it could forbear to enforce it and let it become outlawed or it might otherwise act as any other free agent may. But there was no such condition as is presented by a void or enforcible claim at the option of the party concerned.

Nor can plaintiff's asserted release of defendant's obligation be regarded as a compromise. For though however valid a claim may be, if there is an honest belief by the debtor that it is invalid, it may be compromised. Yet, a compromise, like any other agreement, must be made understandingly. It must have been, of course, understood to be a compromise. No pretence was, or could be made to that effect, in this case. Plaintiff's counsel insist that after the fire there could not be a cancellation of the policy, since liability thereunder had become fixed. They cite as bearing them out in that proposition, Hollingsworth v. Ins. Co., 54 Ga. 294; Duncan v. Ins. Co., 133 N. Y. 88; Van Balkenberg v. Ins. Co., 51 N. Y. 465; and Ins. Co. v. Fordyce, 62 Ark. 562. But defendant distinguishes those cases from the one at bar by calling attention to the fact that in those cases, the cancellation was made in ignorance of the fire, while in this case the parties were advised as to the facts.

The true or real condition of the case is this: Plain-

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tiff accepted the return of the premium money under the mistaken belief that in law the policy had been cancelled. If this act of Reynolds was an act which he had power to perform, and whether, when performed, influenced by such mistake of law as it was, it could be avoided in equity, need not be considered for the reason that, in our opinion, it was not within the power of Reynolds, general agent though he was, to give away the damages then accrued to plaintiff. As claimed by plaintiff, such damages were fixed and were assets of the plaintiff corporation, and it is not in the power of an officer of a corporation to give away its assets. For it is the law that, in the absence of habit or custom with the sanction of the corporation, he has no authority, even for a consideration, to convey the assets. Hyde v. Larkin, 35 Mo. App. 365. The subject was fully considered in the St. Louis Court of Appeals, through Judge Bland, in Ferguson v. Venice Trans. Co., 79 Mo. App. 352, and in Degnan v. Thoroughman, 88 Mo. App. 62. Such view is supported by decisions of the Supreme Court in Hutchinson v. Green, 91 Mo. 367, and Calumet Paper Co. v. Haskell Co., 144 Mo. 331; and also in Webb v. Lumber Co., 68 Mo. App. 546. And also the cases of K. C. Hay Press Co. v. Devoe, 72 Fed. Rep. 717, and Consolidated Water Co. v. Nash, 109 Wis. 490.

There is but one further point which might be considered as affecting plaintiff's right to recover and that is based on the facts surrounding the disposition of that part of the premium paid to the defendant for the insurance. As has been stated, $36.25 had been paid to defendant and then handed back to Reynolds. That sum was kept by Reynolds and was afterwards deposited in bank by him in the name of Manley, defendant's agent, and he was notified of the deposit. No objection appears to have been made to this, further than that it seems to have been ignored by Manley. The record does not show anything further than the deposit and notice. The tender of a certificate of deposit, like a check, if not

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objected to, may be a valid tender. Gradle v. Warner, 140 Ill. 123. But there must, of course, be a tender of the certificate. It must be made to the party. The mere deposit in bank in the name of the party to whom a tender is desired to be made and notice to him is not a tender at all.

But was a tender from this plaintiff necessary, under the facts and the conclusions of law we have already stated? We think not. Reynolds had authority to pay the premium of the insurance. But he had no authority to receive it back as a consideration for renouncing, on giving up an asset of his corporation principal. That is a wholly different matter. As we have already shown, he had no authority to give away, or surrender up, plaintiff's claim. It was an asset, the title to which he had no right to alter. His acceptance of the money was a part of that unauthorized act in which he had no power to bind plaintiff.

We conclude that the court's order setting aside the nonsuit should be affirmed. All concur.

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## PATRICK H. PAYNE, Respondent, v. MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

**Kansas City Court of Appeals, March 7, 1904.**

1. **NEGLIGENCE: Principal and Agent: Principal's Liability.** A petition sounding in negligence alleged that the engineer without orders moved out onto the main track at an hour when he knew plaintiff was generally on said track and ran at a high rate of speed without a headlight. *Held*, the allegation that he was without orders did not make the action the personal one of the engineer so as to relieve the defendant from liability for his negligence since he was in his master's employ and the latter became responsible for his actions within the line of his employment, even though they were willfully and directly antagonistic to orders.

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2. ———: **Engineer's Duty: Party Rightfully on Track.** Where a party is rightfully on the railroad track to the knowledge of the engineer, it becomes his duty to keep a vigilant look-out and if by so doing he could have discovered such party in time to have avoided a collision the railroad company is liable.

3. ———: ———: ———: **Headlight.** If the engineer use every care to avoid striking a party rightfully on the track after he is discovered, yet if the engineer's negligent omission to have a headlight burning was the cause of his failure to discover such party sooner, thereby rendering it impossible to avoid the collision, the company is liable.

Appeal from Lafayette Circuit Court.—*Hon. Samuel Davis,* Judge.

AFFIRMED.

*Wm. S. Shirk* for appellant.

(1) The petition does not state facts sufficient to constitute a cause of action. The petition admits, or rather alleges, that at the time of the happening of the accident, the engineer and fireman of the engine which struck the plaintiff had taken it from the station of Myrick and the yard limits, "without any orders or authority," and that said fireman and engineer, "without orders and authority to run the same," started and operated it on the main track, etc. Reiley v. Railway, 94 Mo. 600; Ridge v. Transfer Co., 56 Mo. App. 133; Walker v. Railway, 121 Mo. 575; Hartman v. Muehlbach, 64 Mo. App. 565. (2) The petition shows upon its face that the collision occurred out in the country, where the engineer had a right to anticipate a clear track, and hence was not bound as a matter of law to see plaintiff, whether he in fact saw him or not, but was only bound to use ordinary care and effort not to injure plaintiff after he actually saw him in a position of peril. Carrier v. Railway, 74 S. W. 1002; Dunkman v. Railway, 95 Mo. 232; Smith v. Railway, 52 Mo. App. 36; Hutchinson v. Railway, 88 Mo. App. 376; Sullivan v. Railway, 117 Mo. 214; Reardon v. Railway,

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114 Mo. 384; Hanlon v. Railway, 104 Mo. 381. (3) The sixth alleged ground of negligence is the failure of the engineer to stop his engine or make some effort to stop it, after discovering the peril of plaintiff, or sound the alarm whistle in time to warn him. It will be noted at once that there is nowhere an allegation that the engineer did see plaintiff in a position of peril in time to have stopped his engine before striking him, or that any kind of an effort, ordinary or otherwise, would have enabled him to stop in time. Barker v. Railway, 98 Mo. 50; Hanlon v. Railway, 104 Mo. 381; Boyd v. Railway, 105 Mo. 371; Scoville v. Railway, 81 Mo. 434; Baker v. Railway, 118 N. C. 1015; Kelly v. Railway, 95 Mo. 279; Railway v. Wilkerson, 46 Ark. 513. (4) The court below should have sustained defendant's demurrer to the plaintiff's evidence. The plaintiff's evidence neither proved nor tended to prove a single material allegation of his petition. (5) Then, too, plaintiff's own evidence showed that he was guilty of gross contributory negligence. He admits that if he had looked back when the engine was 250 to 300 yards from him he could have seen it coming for that distance toward him, and yet he did not look, and although his tricycle was making a great deal of noise, he did not try to listen. This was gross negligence. Tanner v. Railway, 161 Mo. 497; Sharp v. Railway, 161 Mo. 214; Harris v. Railway, 40 Mo. App. 255; Hyde v. Railway, 110 Mo. 272; Ostertag v. Railway, 64 Mo. 42; Riley v. Railway, 68 Mo. App. 652. (6) The jury should have been peremptorily instructed to find for the defendant at the close of all the evidence. This instruction was offered and refused before defendant offered other instructions in the case. Glover v. Bolt Co., 153 Mo. 342; Eberly v. Railway, 96 Mo. App. 361; Maxey v. Railway, 113 Mo. 1; Bunyan v. Railway, 127 Mo. 12; Sinclair v. Railway, 133 Mo. 233; Hauselman v. Railway, 88 Mo. App. 123.

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*Clarence Vivion*, with whom is *Alexander Graves*, for respondent submitted an argument.

ELLISON, J.—This action is for personal injury received by plaintiff on account of alleged negligent management and operation of one of defendant's engines. The judgment in the trial court was for the plaintiff.

Plaintiff charges in his petition that he was an employee of defendant engaged in operating a pumping engine with which water was pumped into one of defendant's water tanks on the line of its road. That his working hours were at night from 6 o'clock p. m. to 6 o'clock a. m. That he lived some distance from the tank and in order to facilitate his service, defendant furnished him a tricycle and permitted him to use it on the track as a mode of conveyance to and from his work. That he usually followed after one of defendant's passenger trains which left a station called Myrick at 5:40 p. m. That before starting he would make inquiry of the station agent whether any other train was expected during the time it would take him to go to his work. That his custom of going along the track at this time was known to defendant's employees, and that on the 8th of November, 1902, he was proceeding on his way following said passenger train, as was his habit, when one of defendant's engineers and firemen in charge of one of its engines took the engine out of its yards at Myrick, without orders or authority from defendant, on to the main track and then started at great speed in the direction which plaintiff was going, without a headlight and without keeping a lookout, and without ringing the bell or sounding the whistle, until they overtook plaintiff at a curve in the track, when they ran against him and his tricycle, inflicting great injury.

There was evidence tending to show that the en-

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gineer knew of plaintiff's use of the track, and that on the night in question he ran his engine up to the tank at an unusual hour; that he generally went much later; and that on this occasion he went without orders; that he ran the engine an a rate of speed of about 30 miles per hour without the headlight burning. The verdict being for plaintiff we must assume the truth of this testimony.

Objection is made by defendant to the effect that the petition states a case which shows it not to be liable, in that it is alleged by plaintiff that defendant's engineer moved the engine out of the yards onto the main track and ran thence to the tank for water without any order or authority from the defendant. The idea suggested is that the act thus alleged was such personal act of the engineer as not to connect defendant by a liability for the consequences resulting therefrom. The petition does not bear that interpretation. The act in going to the tank was an act for the defendant in the prosecution of its business. The business upon which the engineer was bent was the business of the defendant, though he was doing it in an unauthorized manner. It is thus that by far the greater portion of railway liability arises. An engineer may move out from a station with his passenger train without orders and collide with another train. It is thus that most of the unfortunate collisions occur, yet it would not be said that the company was absolved from the fact that the movement of the engineer was unauthorized.

In Curtis v. Railway, 99 Mo. App. 502, a brakeman had put a boy off a moving train who was riding a short distance at a station from one depot building to another, and it was contended that the brakeman was not authorized to eject anyone while the train was in motion. But Judge Broaddus said, in response to that, that the master "by putting the servant in his place becomes responsible for all his acts within the line of his employment, even though they are willful and di-

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rectly antagonistic to his orders.'' The same rule is stated in Haehl v. Railway, 119 Mo. 325.

There being evidence, the tendency of which was to show that plaintiff was rightfully on the track, and especially that defendant's servants knew he was usually going over the track at the time of the accident, it became the duty of such servants to keep a vigilant lookout for him, and if by such watchfulness they could have discovered him in time to have avoided the collision, the defendant is liable for their failure to do so. And even though it be conceded that plaintiff was negligent in not looking back, when by so doing he might have discovered the approaching engine in time to have gotten off the track, yet, if defendant's servants might have seen him by proper watchfulness and care, a liability arose in his behalf, notwithstanding his own carelessness. Morgan v. Railway, 159 Mo. 262.

Furthermore, if we concede that defendant's servants in charge of the engine used every endeavor to avoid striking plaintiff after they discovered him on the track, and that it was impossible to do so, yet, if their negligent omission to have the headlight burning was the cause of their failure to discover him sooner, thereby rendering it impossible to avoid the collision, a liability is chargeable against defendant. Murrell v. Railway (decided this term).

The foregoing practically disposes of all objections to the action of the court on the instructions; those given for plaintiff and those refused for defendant. Several of those offered by defendant were amended by the court, but the amendments are amply supported by the Morgan and Murrell cases. In view of the evidence in behalf of plaintiff as to his injuries, we do not feel that we can say the verdict was excessive.

The judgment will be affirmed. All concur.

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## JERRY HAWORTH, Respondent, v. MINERAL BELT TELEPHONE COMPANY, Appellant.

**Kansas City Court of Appeals, March 7, 1904.**

1. **MASTER AND SERVANT: Negligence: Sending Servant Amid Live Wires.** On review of the evidence it is held sufficient to send to the jury the question whether the defendant was negligent in sending its servant up a telephone pole amid live wires with the assurance that they were insulated when in fact they were not.

2. ———: ———: **Master's Assurance.** Though the servant knew there were live wires, the statement of his foreman that everything was safe and the order to go up the pole was an assurance that the wires were in the proper condition.

Appeal from Jasper Circuit Court.—*Hon. J. D. Perkins,* Judge.

AFFIRMED.

*Walden & Andrews* and *J. W. Halliburton* for appellant.

(1) There was no evidence to warrant the submission of the case to the jury and the court should have given the peremptory instructions asked by the defendant. Electric Illuminating Co. v. Patt, Admx., 84 Va. 747. (2) The defect, if any, was as clear and obvious to plaintiff as to defendant, and no negligence can be predicated thereon. Berning v. Medart, 56 Mo. App. 443; Fugler v. Bothe, 117 Mo. 475; Albridge, Admr., v. Furnace Co., 78 Mo. 559; Watson v. Coal Co. 52 Mo. App. 366; Wray v. South W. E. L. & P. Co., 68 Mo. App. 380; Halliburton v. Railroad, 58 Mo. App. 27; Warner v. Railroad, 62 Mo. App. 184; Junior v. Elec. Light Co., 127 Mo. 79. (3) The burden of



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proof is on plaintiff to show that his injuries were caused by the alleged absence of insulation on the live wire at the lightning connecter. A careful scrutiny of the record discloses no substantial evidence to prove this fact. The evidence must be of a character to remove the question from the domain of mere conjecture. Junior v. Electric Light Co., 127 Mo. 79; Bren v. Cooperage Co., 50 Mo. App. 202; Glick v. Railroad, 57 Mo. App. 97; Hyde v. Railroad, 110 Mo. 272; Peck v. Railroad, 31 Mo. App. 123; Hite v. Railroad, 130 Mo. App. 132. (4) Where one knowingly places himself or his property in danger, the presumption is, that he *ipso facto* assumes all the risk to be reasonably apprehended from such course of conduct. Carroll v. Tel. Co., 107 Mo. 653; O'Donnell v. Patton, 117 Mo. 13; Thompson v. Railroad, 86 Mo. App. 148. (5) A servant assumes all risks from the defective appliances of which he knew or which were so obvious as not to escape the observation of an ordinarily prudent person. Moore v. Wire Mill Co., 55 Mo. App. 491; Stalzer v. Packing Co., 84 Mo. App. 565; Sullivan v. Mfg. Co., 113 Mass. 396; Thompson v. Railroad, 86 Mo. App. 141; Klein v. Shoe Co., 91 Mo. App. 102; Kaminski v. Iron Works, 167 Mo. 462; Shearman & Redfield on Negligence, sec. 219, (5 Ed.); Telegraph Co. v. McMullen, 58 N. J. L. 155, 33 Atl. 384, 6 Am. Ed. 338; Keasby on Electric Wires, 257, (2 Ed.); Junior v. Elec. L. & P. Co., 127 Mo. 79; Keasby on Electric Wires (2 Ed.), sec. 262; Giraudi v. Electric Improv. Co., 107 Cal. 120, 40 Pac. 108, 5 Am. Elec. 318; Piedmont Elec. Illum. Co. v. Patterson, Admx., 85 Va. 747, 6 S. E. 4, 2 Am. El. 350.

*Thomas & Hackney* for respondent.

(1) The plaintiff's evidence made out a prima facie case. It was the province of the jury to determine from the facts in evidence whether defendant's act of negligence was the proximate cause of plaintiff's injury.

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Chambers v. Chester, 172 Mo. 461; Twohey v. Fruin, 96 Mo. 104; Dunn v. Railroad, 21 Mo. App. 198; 1 Shearman & Redf. on Neg. (5 Ed.), secs. 54-55, pp. 64-67; 1 Thompson Com. on Neg., sec. 161; Buswell on Pers. Inj., sec. 98, p. 156. (2) It was conceded on the trial that the live wires on the pole, which plaintiff was required to climb, were dangerous if uninsulated; that they carried such a high voltage as to endanger the life of a person working on the pole if he came in contact with them. (3) It was shown by the plaintiff's testimony that the foreman ordered him to ascend the pole and do this work and did not notify him of the presence of the live wires nor of their uninsulated condition; and the finding of the jury in plaintiff's favor on that issue, eliminates that question from this appeal. (4) The plaintiff did not assume the risk of injury from contact with uninsulated live wires. The mere direction of defendant's foreman to ascend the pole and do the work assigned to him was an assurance that the place where plaintiff was required to work was reasonably safe. Bane v. Irwin, 172 Mo. 316. (5) While plaintiff might be held to have assumed the risk of injury by puncturing the insulation on the live wire had he known of its presence, he did not assume the risk of the increased danger caused by defendant's negligence in removing and failing to replace the insulation on the live wires at the point where he was injured. Chambers v. Chester, 172 Mo. 461.

ELLISON, J.—Plaintiff was an employee of the defendant telephone company. He was injured while engaged in assisting in stringing some additional wires on the poles of the company. He brought this action for damages and obtained judgment in the trial court.

The objection to the judgment refers principally to the right of plaintiff to recover under the evidence. Since the verdict was for the plaintiff we will state in substance what the evidence in his behalf tended to

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prove. He, and some others, were in defendant's employ under the direction of one Watson. They were stringing wires connecting some strawberry beds in the suburbs of the city with the main exchange office, and in endeavoring to get there from a pole down into the office, it became necessary for some one to climb the pole to the height of about twenty feet from the ground and manipulate the wire from that position. Plaintiff knew there were "live wires" on the pole, but Watson directed him to go up and do the work, at the same time assuring him that the wires were insulated and were safe. Plaintiff was equipped with climbers, that is, with steel straps fastened around his legs and sharp spurs at the side of his feet. He climbed the pole and in endeavoring to adjust the wire, he, in some way, came in contact with a live or charged wire, which instantly knocked him from his hold and footing on the pole to the ground, whereby he was greatly injured. It does not appear definitely, however, how he came to come in contact with the wire. Defendant's theory is that he cut into one of the charged wires with the steel spur on his foot. But the theory in his behalf is, and there was evidence tending to support it, that prior to this time the defendant had had the insulation of two of these wires stripped off for a short space within six inches of the pole and that his foot or leg came in contact with the wire at that place. The employee who stripped off the insulation asked the foreman at the time if it should not be replaced and he was told to leave it exposed until they had more time. This was several days prior to the injury, but there was further evidence tending to show that the wires were left in such exposed condition until after plaintiff was hurt. It was shown that Watson stated that he was sorry he had not told plaintiff "about those uninsulated live wires."

It is quite certain that if the story leading up to the injury and the manner it was brought about, as told by plaintiff and his witnesses, is to be believed, but one re-

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sult could follow and that is the result reached by the judgment in the trial court. It was for the jury to say whether matters detailed by plaintiff and his witnesses were true and whether the negligence thus shown against defendant was the proximate cause of the injury. Chambers v. Chester, 172 Mo. 461; Twohey v. Fruin, 96 Mo. 104; Dunn v. Railroad, 21 Mo. App. 198; 1 Shearman & Redfield on Neg. (5 Ed.), pp. 64-67; 1 Thompson Com. on Neg., sec. 161; Buswell on Personal Inj., sec. 98, p. 156.

We do not object to the general statements of the law of what knowledge and acts of plaintiff would throw upon himself the consequences of his conduct in defendant's service; but they are not opposed to the view that the facts as shown in his behalf made a case against defendant. Though plaintiff knew that there were live or charged wires on the pole, he did not know that they had been left stripped of insulation. And the statement of his foreman that everything was safe and the order to him to go up the pole was an assurance that the wires were in proper condition. The law is so laid down in Bane v. Irwin, 172 Mo. 306-316.

It follows that the judgment should be affirmed. All concur.

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## J. J. McQUEEN, Respondent, v. A. J. GROFF, Appellant.

**Kansas City Court of Appeals, March 7, 1904.**

**APPELLATE PRACTICE: Full Transcript: Abstract. Although the appeal be taken in the long form upon a full transcript, yet the appellant is still required to print an abstract under section 874, Revised Statutes 1899, and the appellate court will not go to the transcript to ascertain whether the errors spoken of exist.**

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Appeal from Maries Circuit Court.—*Hon. J. E. Hazell*, Judge.

AFFIRMED.

*Leslie B. Hutchison* and *Jno. O. Holmes* for appellant, filed brief on merit.

*Pope & Terrell & J. T. Pinnell* for respondent.

The respondent submits that the appellant's abstract does not comply with rule 15 of this court in this that it does not contain a clear and concise statement of the pleadings and facts shown by the record therein. The abstract does not state when the affidavit for appeal was filed, nor contain a copy thereof, or state when appeal was granted, or set out enough of the evidence to enable the court to determine whether the demurrer to the evidence was properly overruled, or whether proper judgment was rendered on verdict. All this is required by the rule, and this court will not consider the case in the absence of these essentials in the abstract. Western Storage and Warehouse Co. v. Glasner, 150 Mo. 426; Snoddy v. Jasper Co., 146 Mo. 112; Journeyman T. U. v. C. J. T. Union, 76 Mo. App. 680; Herman v. Dailey, 74 Mo. App. 505; Grocery Co. v. May, 80 Mo. App. 300; Costello v. Fisler, 80 Mo. App. 107; Butler County v. Graddy, 152 Mo. 441; Brassfield v. Knight of M., 92 Mo. App. 102; Smith v. Baer, 166 Mo. 392; Jackson v. Railroad, 85 Mo. App. 443; Deering v. Hannah, 93 Mo. App. 618; Dixon v. Thomas, 91 Mo. App. 364; Ely v. Coontz, 167 Mo. 371; State ex rel. v. Fields, 82 Mo. App. 152.

ELLISON, J.—This action was brought by plaintiff on account of defendant having willfully torn down his fence whereby his field of wheat was exposed to live stock and greatly damaged. There was a verdict for

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plaintiff for forty dollars, which the court doubled and added thereto a penalty of five dollars as is provided by statute. Judgment was thereupon rendered for the total sum of eighty-five dollars.

The appeal is taken in the long form, that is, a full transcript has been filed in this court. And on that account defendant seems to have concluded that a printed abstract is not required, for in referring to the points of objection to the proceedings at the trial, the sufficiency of the evidence, etc., he refers to the pages of the transcript where he states we may find the evidence, or other matter, going to sustain his view. This can not be allowed, as has been so often ruled by the appellate courts of the State. A collection of the cases has been made by plaintiff and will be found in his brief.

It is true that the abstract contemplated by section 813, Revised Statutes 1899 (old section 2253, Revised Statutes 1889) is the abstract required where the appeal is taken in the short form and a full transcript is not sent up to the appellate court. But, there is another statute, which has been in force for many years, which authorizes the appellate courts to require printed abstracts of the record in all cases. Section 874, Revised Statutes 1899.

The only abstract made is that of the record proper, but it does not include those matters of exception which are found in a bill of exceptions. Unless we put aside what defendant has printed and go into the transcript itself, we have no means of ascertaining whether the errors spoken exist. We are thus remitted to the record proper, and finding no error therein we affirm the judgment. The other judges concur.

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# GEO. A. CASE, Appellant, v. HAMMOND PACKING COMPANY, Respondent.

**Kansas City Court of Appeals, March 7, 1904.**

1. **BANKS AND BANKING: Principal and Agent: Authority to Collect: Borrowing.** An agent to sell and collect has no authority to borrow money for or in the name of his principal, even though it be for use in his principal's business, and the principal can not be held unless he ratifies.

2. **———: ———: Notice: Check.** The agent's individual check on the bank remitted to the principal gives the latter no notice that principal has an account with the drawee bank, but on the contrary that the agent has.

3. **———: ———: Ratification: Evidence.** A principal may accept money from his agent in the course of business without inquiry into the source from which it came, and can not be compelled to restore the same to the true owner.

4. **———: ———: ———: ———.** If money due a principal from his agent is obtained by the unauthorized use of the principal's name and paid over to him, and he receives it in good faith without notice, he is not liable to the party from whom the agent got the money, nor does his retaining it after being informed amount to ratification.

Appeal from Jasper Circuit Court.—*Hon. J. D. Perkins*, Judge.

AFFIRMED.

*C. V. Buckley* for appellant.

(1) A customer is liable for his overdraft to a bank. 1 Morse on Banks and Banking, section 360, (4 Ed.); Adams v. Bank, 23 L. R. A. 111; Zane on Banks, 276. (2) An agent to do acts of a class is a general agent. As in this case to sell, collect, pay debts and remit to principal. Cross v. Railroad, 71 Mo. App. 585;

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s. c., 141 Mo. 132; Mabray v. Shoe Co., 73 Mo. App. 1. (3) A principal is bound by all the acts and declarations of his agent within the apparent or real scope of the agent's authority. Am. & Eng. Enc. Law (1 Ed.), 410. Id. 1030; Suddarth v. Empire Co., 79 Mo. App. 585; Mays v. Jarvis-Canklin Mtg. Co., 138 Mo. 275; Clark v. Electric Supply Co.,72 Mo. App. 506; Knowles v. Bullene, 71 Mo. App. 341; Kellar v. Meyer, 74 Mo. App. 318; Haubelt v. Rea, 77 Mo. App. 622; Porter v. Wood, 138 Mo. 539; Garretzen v. Dunbel, 50 Mo. 104; Harriman v. Stowe, 57 Mo. 93; Greer v. Bank, 128 Mo. 559. (4) Where persons deal with the agent of a corporation who assumes authority to act no knowledge of want of authority to so act is brought home to a party dealing with him and no suspicion connected with the act, the corporation is bound thereby, even though he exceeded his authority. Langstrass v. Ins. Co., 57 Mo. 107; Watkins v. Edgar, 77 Mo. App. 148. (5) When the respondent knew that its agent was depositing its funds with and handling its funds through appellant's bank, it was its duty to ascertain his conduct and if negligent in that regard and a loss accrued to appellant, respondent must make good the loss. And even though innocent but on account of such negligence it must sustain the loss. Cummings v. Hurd, 49 Mo. App. 139; Cole v. Butler, 24 Mo. App. 76; Bank v. O'Connell, 23 Mo. App. 165.

*Galen & A E. Spencer* for respondent, *Kay Wood* of counsel.

(1) The rule is that checks must conform to the terms of the deposit. Tiedeman on Com. Paper, 730, section 447; 2 Daniel Neg. Inst., 532, section 1612; 3 Am. & Eng. Ency. Law (2 Ed.), 831 et seq.; Coote v. Bank, Fed. Cases, No. 3203, 3 Cranch C. C. 50; 2 Morse on Banks and Banking, 766, section 432; Ihl v. Bank, 26 Mo. App. 129. (2) Hence plaintiff was

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wrong in allowing checks to be drawn in the name of W. A. King, cashing same and charging to the account entitled Hammond Packing Company. And the burden is on plaintiff to show that every check so paid was properly used in defendant's business. The evidence all showed that this was not the fact. Coote v. Bank, Fed. Cases No. 3204; 3 Cranch C. C. 95; Clark v. Bank, 57 Mo. App. 277-286. (3) The fact that King had authority to collect and remit the proceeds of collections and that defendant received his remittances by personal check, was no notice to the defendant of an attempt to carry deposits in its name, and gave King no implied authority to overdraw the account. On the contrary the fact that King sent defendant his personal check, and that plaintiff paid same, was notice to the defendant that the account was carried in King's name individually, and hence it had no interest in the account and could not be liable for any overdraft. Bank v. Mott, 39 Barb. (N. Y.) 180; Breed v. Bank, 4 Colo. 481; Choteau v. Filley, 50 Mo. 174; Sparks v. Company, 104 Mo. 544. (4) Plaintiff was bound to know King's authority, express or implied, at his peril. This is elementary. 1 Am. and Eng. Ency. of Law (2 Ed.), 987, (5) Defendant received and cashed checks wholly ignorant of the use of its name, or of the fact that the payment of checks would make an overdraft. It received King's personal check as it would the check of any other debtor, and sent same to plaintiff's bank to be paid if funds were present for that purpose. Baldwin v. Burrows, 47 N. Y. 199; Bohart v. Oberne, 36 Kan. 284; Thatcher v. Pray, 113 Mass. 391. (6) Defendant can not be bound by ratification unless it acted with full knowledge of all the material facts connected with the transaction, and the evidence shows conclusively it did not have this knowledge. Pitts v. Company, 75 Mo. App. 221; Cummings v. Hurd, 49 Mo. App. 139.

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ELLISON, J.—This action is to recover what is termed an overdraft charged to have been made by defendant. The judgment was for defendant in the trial court.

Plaintiff is engaged in the banking business in Joplin. Defendant is a meat packing establishment at St. Joseph, Mo., and one King was its agent at Joplin to sell meat, collect accounts and remit proceeds to defendant at St. Joseph. We will assume, as contended by plaintiff, that the evidence shows that he opened an account with the plaintiff bank in the name of the defendant, "The Hammond Packing Company—W. A. King," and that he made sales of meat for defendant and collected the price thereof. That he deposited such collections with plaintiff to the credit of the account thus opened. He would from time to time draw his check on this account in his individual name and send it to defendant at St. Joseph, as proceeds of his sales of meat. He, however, also deposited his individual funds in this account and checked on it in his individual business. This mode of business continued for several months, when, finally, he drew two checks aggregating $1,581, which overdrew the account that amount. Defendant refused to pay it on the ground that it never authorized the opening of the account with plaintiff and that it did not know it had been opened until plaintiff demanded payment of the overdraft.

The trial court sitting as a jury found (and it could not have well done otherwise) that defendant never authorized King to open an account with plaintiff and that it knew nothing of it. King was not shown to have any other authority to represent defendant than to sell its meat products and collect and remit the proceeds of such sales. Such agency did not authorize him to open a bank account for defendant, nor to borrow money for it. Nor did such agency confer an apparent authority on King justifying plaintiff in believing real authority ex-

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isted. The case is not at all like that of Cross v. Railroad, 71 Mo. 585; s. c., 141 Mo. 132. An agent to sell and collect the price has no authority to borrow money for or in the name of his principal, even though it be for use in the principal's business, and the principal could not be held, unless, of course, he should ratify the act.

But it is said that defendant received King's checks on the plaintiff bank and must have known of the account. The checks were notice to defendant that King had an account with plaintiff, but not that it had. Indeed King's individual checks could not lead one to suppose they were drawn on his principal's account, for such checks would not authorize payment out of the principal's money. Ihl v. Bank, 26 Mo. App. 129.

There was nothing shown from which it can be inferred that defendant ratified King's act in overdrawing. As has been already stated, the defendant did not know that King had opened an account in its name. It did not know that the money which it received was an overdraft on such account. It received and accepted the money as money due from King which he had collected from customers. Money is a current fund which any one, without notice, has a right to receive in good faith in payment or a debt, without inquiry into the source from which it comes; and the person so receiving it can not be compelled to restore it to him who was the true owner. Stephens v. Board of Education, 79 N. Y. 183; Hatch v. Bank, 147 N. Y. 184; Justh v. Bank, 56 N. Y. 478; Smith v. Bank, 107 Iowa 620.

But it is said by plaintiff that defendant received and kept the money represented by the overdraft. That fact does not create a liability against defendant. If money due a principal from his agent is obtained by such agent by the unauthorized use of the principal's name and paid over to the principal, who receives it in good faith, without notice, he is not liable to the party from whom the agent got the money. The fact that he

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keeps the money, after being informed of how the agent obtained it, is not a ratification. Thatcher v. Pray, 113 Mass. 291; Baldwin v. Burrows, 47 N. Y. 212; Galick v. Grover, 33 N. J. 463; Bohart v. Oberne, 36 Kansas 284; The Penn. Co. v. Dundridge, 8 Gill & J. 323; Lime Rock Bank v. Plimpton, 17 Pick. 159.

The judgment should be affirmed. All concur.

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## DELIA DOHERTY, Respondent, v. KANSAS CITY Appellant.

**Kansas City Court of Appeals, March 7, 1904.**

1. **MUNICIPAL CORPORATIONS: Defective Sidewalk: Pleadings: Aider by Verdict.** A petition for personal injury by reason of a defective sidewalk stated that the walk had been in a defective condition for a long time, but failed to state plaintiff's knowledge thereof, or its failure to exercise reasonable care to ascertain. There was no objection to the petition at the trial. *Held*, the petition was amendable and is sufficient after judgment.

2. **———: Personal Injury: Defective Sidewalk: Scienter: Instruction.** The plaintiff's instruction failed to submit the question of the defendant's notice or of the existence of the defect for a sufficient length of time to affect the defendant with constructive notice and it was not cured by any other instruction, and the verdict being possibly excessive the error in the instruction is held fatal.

Appeal from Jackson Circuit Court.—*Hon. J. H. Slover*, Judge.

REVERSED AND REMANDED.

*R. J. Ingraham*, City Counselor, and *L. E. Durham* for appellant.

(1) Plaintiff's instruction No. 1 does not require the jury to find that defendant was negligent, that is, that defendant had reasonable time and opportunity to

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repair the walk after knowledge of the defect, but failed to do so. Bonine v. Richmond, 75 Mo. 437; Richardson v. Marceline, 73 Mo. App. 360; Badgley v. St. Louis, 149 Mo. 122; Baustian v. Young et al., 152 Mo. 317; Reedy v. Brewing Ass'n, 161 Mo. 539; Jordan v. Hannibal, 87 Mo. 675; Yocum v. Trenton, 20 Mo. App. 489; Barr v. Kansas City, 105 Mo. 558; Maus v. Springfield, 101 Mo. 613; Plummer v. Milan, 79 Mo. App. 444; Burleson v. Village of Reading, 110 Mich. 512; Rehberg v. New York, 91 N. Y. 142; Logansport v. Justice, 74 Ind. 378; Thompson on Trials, section 1706; Elliott on Streets and Roads (2 Ed.), section 631. (2) Plaintiff's instructions on measure of damages assumes that injury was inflicted. Plummer v. Milan, 70 Mo. App. 598; Evans v. Joplin, 76 Mo. App. 260. (3) The damages are so excessive as to show passion and prejudice on part of the jury. (4) Plaintiff's petition does not state a cause of action. Consequently the court erred in overruling defendant's motion in arrest of judgment. See authorities, part 1.

*John M. Cleary, I. Kimbrell* and *C. M. Kackley* for respondent.

(1) Plaintiff's petition states a cause of action. If any material allegation is not expressly averred but same be necessarily implied for what is stated therein the defect is cured by the verdict. Hurst v. Ash Grove, 96 Mo. 168; Bowie v. Kansas City, 51 Mo. 454; Grove v. City of Kansas, 75 Mo. 675; Foster v. Railway, 115 Mo. 165; Johnson v. Railway, 96 Mo. 340; Buck v. Railway, 46 Mo. App. 555; Mack v. Railway, 77 Mo. App. 232; Dougherty v. Railway, 81 Mo. 325; Senate v. Railway, 57 Mo. App. 223; Jaquin v. Railway, 57 Mo. App. 320; Subdivisions 8 and 9, section 672, Revised Statutes 1899. (2) Plaintiff's instruction No. 1 fairly presented the case to the jury. The evidence was sufficient to justify the presumption that the defendant city had

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timely notice of the defect, and to justify the jury in so finding. Young v. Webb City, 150 Mo. 342; Haus v. Springfield, 101 Mo. 613; Richardson v. Marceline, 73 Mo. App. 365; City of Griffin v. Johnson, 84 Ga. 279; Tice v. Bay City, 78 Mich. 209; Philadelphia v. Smith, 16 Atl. Rep. 493. (3) Plaintiff's instruction No. 1 is not erroneous. If it contains any error, then instruction No. 3 given at the instance of appellant is alike erroneous. The error, if any, is common to both, and therefore not grounds for reversal. Young v. Webb City, 150 Mo. 342; Richardson v. Marceline, 73 Mo. App. 364. (4) The assumption is an instruction of an issuable fact, conceded by the other party, or about which there can be no reasonable controversy, is not erroneous. Herriman v. Railway, 27 Mo. App. 445; Field v. Railroad, 80 Mo. 206; Hall v. Railroad, 74 Mo. 298; Price v. Haeherle, 25 Mo. App. 201; Burlington v. Bank, 98 Mo. 376; Walker v. City of Kansas, 99 Mo. 647. (5) Plaintiff's second instruction on measure of damages does not assume anything. Chilton v. St. Joseph, 143 Mo. 192; Young v. Webb City, 150 Mo. 343. (6) A judgment for two thousand dollars is not excessive under the evidence in the case at the bar. Dimmit v. Railroad, 40 Mo. App. 658; Honeycutt v. Railway, 40 Mo. App. 679; Brown v. Railway, 99 Mo. 319; Baker v. Independence, 93 Mo. App. 171; Huff v. Marshall, 97 Mo. App. 547; Baker v. Independence, 93 Mo. App. 165; Fleming v. Railway, 89 Mo. App. 129; Goetz v. Ambs, 27 Mo. 25; Kennedy v. Railway, 36 Mo. 351; Curtis v. McNair, 173 Mo. 270; Malloy v. Railway, 173 Mo. 85; Bolton v. Railway, 172 Mo. 105.

BROADDUS, J.—The plaintiff sues to recover damages sustained by reason of a fall she received in passing over one of defendant's sidewalks at a point on Madison street. The evidence shows that she was tripped by the tilting of a loose board in said walk, fell and was injured. It was shown that the sidewalk had

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been in an unsafe condition for several weeks but there was no evidence that defendant's officers had actual notice of its condition in time to have repaired it before plaintiff's injury.

There was a trial and verdict for plaintiff for $2,000.

The defendant contends that the petition does not state a cause of action, that the verdict is excessive, and that the court committed error in giving certain instructions in behalf of plaintiff.

The petition fails to state that defendant had notice of the defective condition of the walk, or that it had so existed for such a length of time that defendant by the exercise of ordinary care could have known of its condition in time by the exercise of such care to have repaired it so as to have prevented plaintiff's injury. No objection was made during the trial to the petition on account of the defect noted. It does state, however, that the sidewalk was maintained by defendant in its defective condition for a long time prior to plaintiff's injury. It is a defect that could be made good by amendment, and is sufficient after judgment. Hurst v. Ash Grove, 96 Mo. 168.

But the same error occurs in plaintiff's instruction number two. And there were no other instructions on either side that cured the error. Plaintiff contends that it was a harmless error at most as all the evidence went to show that the sidewalk had been in an unsafe and dangerous condition for a long time previous to the plaintiff's injury, and notice to defendant should be inferred as a matter of law. But in view of other evidence that its bad condition was not discoverable, we do not feel justified in so holding. And we entertain grave doubts as to the propriety of the amount of the verdict. The evidence as to the permanent injury to plaintiff's leg is not altogether satisfactory. It appears to have been larger than the other one but some of the medical experts were of the opinion that it was

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the result of varicose veins and not the result of the injury. Dr. Halley, one of plaintiff's witnesses, testified that the cause of the injury primarily was the varicose veins, secondly, the injury. It does not appear that she lost more than two months' time of her labor.

Under the peculiar circumstances of the case we do not feel at liberty to disregard the error on the ground that the verdict in every particular is for the right party.

Reversed and remanded. All concur.

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CHAS. O. PORTER, Appellant, v. REUBEN H. SHOTWELL, Defendant; S. V. SMITH, Interpleader, Respondent.

Kansas City Court of Appeals, March 7, 1904.

1. **FRAUDULENT CONVEYANCES: Change of Possession: Bailment: Notice.** When property is not in the possession of the vendor, but is actually in the possession of a third party as bailee, an order for the property on its sale and notice to the bailee is all that is necessary to transfer the possession as against the creditors of the vendor.

2. **———: ———: Notice to Vendee.** Certain instructions relating to the access of the vendor to the transferred property are held properly refused since they fail to submit the question of the vendee's notice and assent of the conduct of the vendor.

Appeal from Jackson Circuit Court.—*Hon. W. B. Teasdale,* Judge.

AFFIRMED.



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*T. A. Frank Jones* for appellant.

(1) To establish his right and title to the goods attached the interpleader must prove that the receipts of the warehousing company offered in evidence by him possess all the requisites of warehouse receipts as recognized and defined in the law. The mere indorsement and delivery of the receipt of an ordinary bailee does not transfer the title or the possession of the goods described as against creditors. Sinsheimer v. Whitley, 111 Cal. 378; Geilfuss v. Corrigan, 95 Wis. 651; Jones on Pledges (2 Ed.), sec. 280b; Shepardson v. Cary, 29 Wis. 35; Bell and Coggeshall Co. v. Glass Wks., 48 S. W. 440; Trust Co. v. Trumbull, 137 Ill. 146; Bank v. Whitehead, 149 Ind. 560; sec. 10568, Revised Statutes 1899; Bank v. Frank, 12 Mo. App. 460. (2) Instruction number two given to the jury for the interpleader is erroneous, first, because there was no evidence that the warehousing company had and kept "actual, visible and continued" possession of the grain levied upon, all the evidence being that such possession as the company had was either constructive or occasional, and, second, because the instruction assumes that the warehousing company had actual, visible and continued possession of the building in which the grain was kept, contrary to the fact and the evidence. (3) There was further prejudicial error against the plaintiff in the refusal of his instruction number four, all the matters of fact therein referred to being supported by the evidence, and the evidence in regard to the possession of the grain being of such a character that the jury required legal instruction to arrive intelligently at a verdict.

*Stickney & Brooker* and *Cook & Gossett,* for interpleader.

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(1) Personal property in the hands of a bailee may be transferred or pledged by the owner thereof by assignment of the bailee's receipt therefor by which the bailee agrees to hold the property for the bailor, or his assigns of the receipt, or by bill of sale, or order on the bailee, and such transfer is equivalent to actual delivery of possession. Such a sale or pledge is good as against all the world, including creditors of the transferring owner. Williams v. Gray, 39 Mo. 201; Erwin v. Arthur, 61 Mo. 386; Mueller v. Guy, 12 Mo. App. 588; Midland Bank v. Railway, 62 Mo. App. 531. In this case the bailee's receipts expressly show that the bailee was to hold the wheat for the holder of the receipts and that a transfer of the receipts should entitle the holder thereof to the wheat. Jones on Pledges (2 Ed.), secs. 10, 34 and 35; Boynton v. Payson, 67 Maine 578; Tibbetts v. Flanders, 18 N. H. 284. Even though bailee is clerk or employee of the pledgor if the goods are separated and marked. Summer v. Hamlet, 12 Pick. (Mass.) 76; Coombs v. Tuchelt, 24 Minn. 423; Lanaux's Succession, 46 La. Ann. 1036; Prince v. Eighth St. Church, 20 Mo. App. 332. (2) The plaintiff's instruction No. 4 was properly refused. Claflin v. Rosenberg, 42 Mo. 439; Jones on Pledges (2 Ed.), secs. 41 and 44. (3) Plaintiff's instruction No. 5 was properly refused because it told the jury that it was necessary that the warehousing company should have received and stored the grain for hire.

ELLISON, J.—This action was brought and an attachment in aid was sued out and levied upon a lot of buckwheat as the property of defendant. Interpleader claimed the grain and filed his interplea therefor. He prevailed in the trial court.

It appears that defendant was a miller and that he had a warehouse or storage building situated three or

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four blocks from his mill. He leased this to the "Merchants & Manufacturers' Warehousing Company of New York, Incorporated." That before the attachment was issued he had the grain in controversy deposited in the warehouse and took from the warehouse company a receipt therefor. He borrowed money of interpleader and assigned to him as security the receipt for the grain, of which the evidence shows the warehouse had notice. The warehouse company had its sign on the building and on bins inside. There was evidence tending to show that defendant was to go to the warehouse at necessary times and stir the grain and keep it in good condition; that he had a key to the building and that he kept some of his property there, a part of which he would get from time to time. There was evidence, too, which might be stated generally tended to show that defendant had access to the warehouse at all times. So, there was evidence that on more than one occasion defendant paid a portion of his indebtedness to interpleader and the latter would let him have a proportionate part of the grain by directing the warehouse company to that effect, which would be endorsed on the receipt which interpleader held.

The instructions for interpleader submitted that if these acts of defendant were in good faith, while they should be considered by the jury, yet alone they did not, of themselves, render the storage of the grain and the transfer to interpleader fraudulent. Other instructions affirmed the legal validity of a change of possession of the property by a transfer of the receipt to interpleader.

Much has been said by plaintiff to show that the receipt held by interpleader was not what is technically known as a warehouse receipt; and that its transfer to interpleader did not, and could not, transfer possession of the property.

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It can make no difference in the result which must be reached in this case whether the institution styled "Merchants and Manufacturers' Warehousing Company of New York," was what would properly be designated a warehouseman. It was in possession of the grain and was at least a bailee. Now, when property is not in the possession of the vendor, but is actually in the possession of a third party as bailee, an order for the property on its sale, or on its being mortgaged, or pledged, and notice to the bailee, is all that is necessary to transfer the possession as against creditors of the vendor. How v. Taylor, 52 Mo. 592; Halderman v. Stillington, 63 Mo. App. 212; Worley v. Watson, 22 Mo. App. 546. If the vendor, as in several of the cases cited by plaintiff, is in possession, or retakes possession, or the transaction, in point of fact, is a sham or pretense, an essential element to a valid transfer would be lacking.

Defendant's refused instructions were properly rejected by the trial court. The first recites certain named acts of defendant in regard to his access to the building and his opportunities to remove its contents, and states that such acts could be taken into consideration in determining who was in possession. Substantially, the same things had been included in interpleader's instruction number two, and the refusal was therefore harmless. But in addition to that, the instructions, as asked, left wholly out of consideration whether the interpleader knew of defendant's supposed conduct, or assented thereto.

The second instruction refused, submits the hypothesis of a mere pretense of possession as between the warehouse company and defendant, but in no way makes it necessary to find that interpleader was a party to the sham, or had knowledge of it.

We have not discovered anything to authorize a reversal and the judgment will be affirmed. All concur.

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# JOSEPH P. VEALE, Respondent, v. L. R. GREEN, Appellant.

**Kansas City Court of Appeals, March 7, 1904.**

1. **REAL ESTATE BROKER: Principal and Agent: Demurred Evidence: Instructions.** On a review of the evidence it is held to be sufficient to send to the jury the question of agency between broker and landowner, and that the instructions properly submitted the case.

2. ———: ———: **Evidence: Letters.** On an issue of agency certain letters are held admissible since they show the situation concerning the matters up to the final employment.

3. ———: ———: **Offer: Acceptance: Evidence.** The evidence is held sufficient to warrant the finding of acceptance of an offer made by a landowner to a broker.

4. **APPELLATE PRACTICE: Evidence: Finding.** Although there was ample evidence to have sustained the finding of the jury for the other party, the appellate court is not warranted in setting aside the verdict of the trial court.

Appeal from Barton Circuit Court.—*Hon. H. C. Timmonds*, Judge.

AFFIRMED.

*Thurman, Wray & Timmonds* for appellant.

(1) The letters of defendant, marked exhibits "C" and "D" were not admissible in evidence in this case. These letters were written from two to four years before the date of the contract sued on, if it be conceded such contract was ever entered into. (2) There is no substantial testimony in this record tending to support the allegation in plaintiff's petition, that, "thereafter plaintiff in pursuance of such contract and agreement between plaintiff and defendant, did procure a purchaser for said land . . . and was instrumental in

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bringing about a sale of said land." (3) While it is true that all the instructions should be read together, yet if there is such conflict as would likely mislead or confuse the jury, such conflict constitutes error. White v. Ins. Co., 93 Mo. App. 282.

*Cole, Burnett & Moore* for respondent.

(1) It is difficult to see why the admission of these letters constituted error, and counsel's brief discloses that they are uncertain about it themselves. Thompson v. Chappell, 91 Mo. App. 303. Our position is that the contract was forming during all these years, between these two comparatively unskilled men, and that the services were likewise being rendered for which defendant agreed to pay him $320. All letters relating thereto are admissible. Hammond v. Beeson, 112 Mo. 201. (2) With only three or four brief instructions to read, there is surely no danger that the jury was confused or misled by them. When read together, as they must be, they are perfectly harmonious, and quite plain in their direction that plaintiff could recover only for what he said and did after February, 1898. The instructions are not "inconsistent and contradictory," and it is well known law that the failure to embrace all the issues in one instruction is not error, if they are all embraced in the series of instructions given; even though one instruction may be slightly faulty, or incomplete. Muelhausen v. Railway, 91 Mo. 332; Crawford v. Doppler, 120 Mo. 362; Simmons v. Ingram, 78 Mo. App. 608; Knight v. Sadler Co., 91 Mo. App. 574; State v. Smith, 164 Mo. 585; Bertram v. Railroad, 154 Mo. 654; Weldon v. Railroad, 93 Mo. App. 675; Tyler v. Parr, 52 Mo. 250.

ELLISON, J.—This action is to recover commission alleged to be due plaintiff for selling a section of land in Barton county for defendant. The plaintiff recovered judgment in the trial court.

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The petition declares on a contract without naming the date of such contract. But it states its terms to be that if plaintiff would procure a purchaser for the land at twenty dollars an acre defendant would pay him a commission of two and one-half per cent of the total purchase price. It then alleges that in pursuance of such contract, plaintiff did procure a purchaser and that he was instrumental in bringing about the sale.

The evidence in plaintiff's behalf tended to show that beginning back in 1893, defendant, who lived in Illinois, made plaintiff his agent to rent the land and also to sell it, though no price was named and the amount of compensation was not agreed upon. In that year a man named McClanahan was renting some land of plaintiff, and plaintiff rented the defendant's land to him, having in view, as he testified, the idea of finally selling it to him. That when defendant came to see plaintiff in Barton county in 1894, he expressed the opinion that McClanahan was too much "of a boy." But that in a day or two he came back to plaintiff and said to him that he felt better suited with his selection of McClanahan and that he had been informed that McClanahan would buy the place before he left it. Plaintiff then said to defendant that that was the reason he put him there and that if defendant did not sell the place before McClanahan got ready or able to buy, he would sell it to him. Plaintiff and McClanahan talked of the latter buying the place from time to time. And so did plaintiff and defendant, the latter frequently inquiring if plaintiff thought McClanahan would buy the place. This continued on up to February 13, 1898, the date of defendant's letter to plaintiff about his affairs in this State, in which, among other things about other matters of business between them, he stated that if plaintiff would sell the place for twenty dollars per acre he would give him two and one-half per cent commission.

Finally, in about three years after the receipt of the letter just referred to, McClanahan went to Illinois,

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without plaintiff's knowledge, and bought the land of defendant direct for twenty dollars per acre. It seems that defendant was in Barton county when the sale was consummated and that after it was all settled he remarked to McClanahan that he would "now go over and pay Joe (plaintiff) and tell him I don't need him any longer." Defendant, however, contends that that remark referred to pay for other business plaintiff had done for him.

Taking the whole evidence in plaintiff's behalf and accepting it as true, as we must do in passing on the question of the court's refusal of defendant's demurrer, it is clear enough that plaintiff had a continuous permissive authority to sell defendant's land, beginning several years prior and running up to the sale. That during this time plaintiff was calculating on selling to McClanahan if it was not sold before he became ready to buy and that defendant knew of this. That plaintiff frequently talked about it with McClanahan and that it was with a view of selling to him that he first got him onto the place as a tenant, of which he informed defendant. There is no doubt that this desire and effort on plaintiff's part continued up to the time that the land was actually sold by defendant. McClanahan said that before departing for Illinois to see defendant, he had learned from plaintiff at what price the land could be had.

We have by no means overlooked the argument in defendant's behalf to the effect that there is no evidence whatever tending to show that plaintiff made any effort to sell the land after February 13, 1898, (the date of the letter stating his compensation) during the last three years preceding the sale. But we think there is. The face of the entire evidence, as given by plaintiff in his own behalf, shows that his expectations and hopes of sale and his efforts to that end, were continuous; that is to say, from time to time through the whole

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period, beginning with the first authorization, and running up to the sale. There is no reasonable ground upon which to base the assertion that plaintiff's efforts ceased on and after the amount of his compensation was agreed upon, and that the three years between that time and the actual sale, were passed without further effort by him. A fair interpretation of his evidence does not justify that conclusion. It may be that plaintiff's petition held him in narrower bounds than his rights justified. It would perhaps have been better if the petition had set out the facts of the employment and final statement of compensation as they were. But taking the case, as it is, it will not do to say that there is nothing after February 13, 1898, to support plaintiff's claim.

We do not think the criticism of the instructions is well grounded. Instruction "A," in view of the evidence, might be thought to be too general, or too indefinite. But it is immediately followed by instruction "B," which clearly sets forth the limit of plaintiff's right to recovery.

Neither do we think that defendant's objections to the letters which he wrote to plain are meritorious. The letters show the situation and relation between the parties concerning matters directly leading up to the final letter of employment as stated in the petition. The answer denied any employment. No better proof on plaintiff's part could be made of that issue than by starting at the beginning of those matters which bore upon the question whether plaintiff was engaged to sell the land. It certainly would have been unreasonable to have held plaintiff to the one letter showing an employment which defendant denied making. Hammond v. Beeson, 112 Mo. 190, 201.

It is further suggested that there was no evidence that plaintiff accepted the terms or offer of employment made in the letter of February 13, 1898. What we have already said as to plaintiff's continued effort after

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the receipt of the letter is sufficient to dispose of that objection.

In considering what we deem to be the principal question in the case we have not referred to the evidence direct and circumstantial, in defendant's behalf. There is much in it going to show that plaintiff did not consider that defendant owed him anything for the sale of the land. The evidence is, indeed, so strong in defendant's behalf, that had the verdict been for him no one would have thought of questioning it. But at the same time, as we have already said, if we accept the evidence in plaintiff's behalf and reasonable inferences which may be drawn therefrom as being true, there is no authority resting in us to disturb the verdict, and the judgment is accordingly affirmed. The other judges concur.

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## GEO. R. NELSON, Appellant, v. JOHN KASTLE, Respondent.

**Kansas City Court of Appeals, March 7, 1904.**

1. **BILLS AND NOTES: Check: Principal and Surety: Presentation.** Delay in the presentation of a check does not release the drawer since he is not a surety but the principal debtor. A check is an absolute appropriation of the money in the bank and it ought to remain there until called for.

2. ———: ———: **Delay in Presentation: Burden of Proof.** But the holder has the burden of proof to show that the drawer has not suffered loss by the failure to present.

3. ———: **Protest: Evidence: Statute.** The certificate of protest is not evidence of any collateral fact therein stated and, under the statute, only proves two facts: demand and refusal to pay. Recital of why the drawee refuses to pay is not admissible.

Appeal from Jackson Circuit Court.—*Hon. E. P. Gates*, Judge.

AFFIRMED.

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*Joseph S. Rust* for appellant.

(1) It is difficult to understand on what theory the court could rightly sustain the demurrer to the evidence in this case. (2) "A demurrer to the evidence admits every reasonable inference favorable to the plaintiff." Creighton v. Modern Woodmen, 90 Mo. App. 378; Butler Co. v. Bank, 143 Mo. 13.

*Daniel B. Holmes* for respondent.

(1) This action being on a check against the drawer it was necessary for the plaintiff, in order to maintain the action, to prove due presentment and notice of dishonor to the drawer, or else to prove, in lieu of due presentment and notice, that the drawer has not suffered injury by reason of the want of due presentment and notice. 5 Am. & Eng. Ency. Law (2 Ed.), 1040, 1042, 1045; 2 Daniel Neg. Inst. (4 Ed.), secs. 1586, 1588, 1590; Anderson v. Rodgers, 53 Kas. 548; Moody v. Mack, 43 Mo. 210. (2) The weight and credibility of the evidence were solely for the trial court to determine. Schroeder v. Railroad, 108 Mo. 322; Taylor v. Cayce, 97 Mo. 242; Thies v. Garbe, 88 Mo. 146; Clark v. Railway, 127 Mo. 268; Butler v. Bank, 143 Mo. 23. "The certificate of protest is not evidence of any collateral facts which may have been stated in it. Thus, if it state that the reason given by the drawee for non-acceptance was that he had no effects or funds of the drawer, it is no evidence of the want of effects or funds." 2 Daniel, Neg. Inst. (4 Ed.), sec. 966; Bank v. Hatch, 78 Mo. 22.

BROADDUS, J.—This suit was begun in a justice's court upon the following statement:

"Plaintiff for his cause of action states that on Jan. 19, 1886, defendant executed and delivered to him for

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valuable consideration a check of that date for $200 drawn by defendant in favor of plaintiff on the Citizens' National Bank of Kansas City, Mo., which check is hereto attached and made a part hereof; that plaintiff presented said check to said bank for payment and payment was refused; that said bank refused to pay said check because so instructed by defendant; that at all the times above mentioned defendant was a resident of the state of Missouri, but that for the past ten years, defendant has been a resident of the state of California," etc.

The check referred to is as follows: "K. C., Mo., Jan. 19th, 1886. Cit. Nat'l Bk. Pay to Geo. R. Nelson or order two hundred dollars. John Kastle."

The endorsement were as follows: "G. R. Nelson, Citizens Nat'l Bank of Kansas City, for credit account of William W. Kendall Boot & Shoe Co. C. Marshall, Treas."

On the eighteenth of June, 1888, the check was presented to said bank and protested for non-payment, the certificate of the notary reciting demand, refusal to pay, and that the bank made answer that, it had "no funds." The certificate also recites that written notice of protest was made on John Kastle and G. R. Nelson by delivering the same to said Nelson personally, and also by written notice to the W. W. Kendall Boot & Shoe Co. Defendant objected to this paper, which objection was overruled as to the protest but sustained as to the written notice of protest.

Plaintiff introduced one J. H. Lipscomb, who testified as to the non-residence of the defendant. He was asked also to state what he knew as to the defendant having instructed the bank not to pay the check. He answered at first that he knew such to be the fact. He was then questioned as follows: "How do you know it? That is the question we want to know about. If you don't know it, I want it stricken out from your testimony." He answered: "Well, I don't know that."

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At the close of plaintiff's testimony defendant interposed a demurrer to his case which the court overruled. Defendant introduced no evidence and the cause was submitted to the court. No instructions were asked on either side. The finding and judgment were for defendant. The plaintiff contends that the finding of the court was in effect a sustaining of said demurrer to plaintiff's evidence, but the record shows that said demurrer was overruled. However, as the defendant introduced no evidence it can make little or no difference as the result in this case would practically be the same.

The rule as to delay by the holder in the presentation of a check as stated in 4 Kent 549, was adopted by the Supreme Court in Morrison v. McCartney, 30 Mo. 183. It is this: "The drawer of a check is not a surety but the principal debtor as much as the maker of a promissory note. The check is the acknowledgment of a certain sum due. It is an absolute appropriation of so much money in the hands of his banker to the holder of the check, and there it ought to remain until called for; and unless the drawer actually suffers by the delay, as by the intermediate failure of his banker, he has no reason to complain of delay not unreasonably protracted. If the holder does so unreasonably delay, he assumes the risk of the drawee's failure, and he may, under circumstances, be deemed to have made the check his own to the discharge of the drawer." Graham's Exr. v. Morstadt, 40 Mo. App. 333.

But the burden is on the holder to show that the drawer has not suffered loss from the failure to make presentment. Tiedeman on Com. Paper, section 442. There is no evidence whatever as to whether defendant was or was not injured by the delay in the presentment of said check unless it be the recitation in the notarial protest that payment was refused for want of funds.

In 2 Daniels on Neg. Inst., section 966, the rule of law as to the competency of such evidence is stated as

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follows: "The certificate of protest is not evidence of any collateral facts which may have been stated in it. Thus, if it state that the reason given by the drawee for non-acceptance was that he had no effects or funds of the drawer, it is no evidence of the want of effects or funds." Section 463, Revised Statutes 1899 is as follows: "A notarial protest is evidence of a demand and refusal to pay a bill of exchange or a negotiable promissory note at the time and in the manner stated in such protest."

The statute only makes such protest evidence of two things, viz: demand and refusal to pay at the time and in the manner stated. The statute does not make a statement of a notary why payment is refused, evidence. We can find no authority to that effect. Consequently, we are without any authority to so hold. And therefore there is no evidence that defendant was not injured by the delay in presentation of the check.

As there was no evidence that defendant had removed his funds from the bank, plaintiff was not entitled to recover. The statement of Mr. Lipscomb is not to be construed as such, as he stated he had no such knowledge. Affirmed. All concur.

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## BERTHA GERBER, Respondent, v. KANSAS CITY, Appellant.

**Kansas City Court of Appeals, March 7, 1904.**

1. **MUNICIPAL CORPORATIONS: Defective Sidewalk: Pleading: Alder by Verdict.** A petition defective in not averring knowledge of the defect in a sidewalk in time to repair it before the injury is held to be cured by the verdict since the question of sufficient time to repair depends on the attending facts and circumstances and was for the jury.

2. ———: ———: **Instructions: Time to Repair.** Instructions set out in the petition are condemned because they fail to submit the question whether the defendant had knowledge of the alleged defect in time to repair same before the accident.

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3. ———: ———: **Guarding Defect.** Said instructions are likewise faulty in that they impose on the defendant the duty to keep the place guarded or lighted since such failure is not negligence *per se,* but is a question for the jury under the evidence.

4. ———: ———: ———: **Departure: Evidence.** Said instructions were likewise faulty in departing from the specified negligence of the petition and are unsupported by the evidence.

5. ———: ———: ———: **Prejudice.** In the absence of a satisfactory showing that error is harmless, it must be concluded that it is prejudicial.

Appeal from Jackson Circuit Court.—*Hon. J. H. Slover,* Judge.

REVERSED AND REMANDED.

*R. J. Ingraham,* City Counselor, and *L. E. Durham* for appellant.

(1) Plaintiff's instructions 3 and 4 are erroneous, in that they declare as a matter of law that in this case a failure to erect barriers or signals was negligence. For this error this case should be reversed. Campbell v. Stanberry, 85 Mo. App. 159; Staples v. Trenton, 69 Mo. 592; Loewer v. Sedalia, 77 Mo. 445; Chicago v. Baker, 195 Ill. 54; O'Malley v. Parsons Borough, 191 Pa. St. 612. (2) Before a failure to erect barriers or signals around a hole in a sidewalk is negligence as a matter of law, there must be some law or ordinance requiring the erection of same. Skinner v. Stifel, 55 Mo. App. 9; Campbell v. Stanberry, 85 Mo. App. 159; Myers v. Kansas City, 108 Mo. 480; Sanders v. Railroad, 147 Mo. 411; Jackson v. Railroad, 157 Mo. 621; Weller v. Railroad, 164 Mo. 180. (3) Said instructions in their reference to barriers and signals depart from the negligence pleaded, and are not supported by the evidence in this respect. Chitty v. Railroad, 148 Mo. 64; Hayne v. Trenton, 108 Mo. 123; Kennedy v. Railroad, 70 Mo. 252; Ely v. Railroad, 77 Mo. 34; Melvin v. Railroad, 89

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Mo. 106; Price v. Railroad, 72 Mo. 414; Edens v. Railroad, 72 Mo. 212; Gurley v. Railroad, 93 Mo. 445. (4) Plaintiff's instructions are erroneous because they do not require the jury to find that defendant city knew of the defect in the sidewalk in time to have repaired same before the accident. Badgley v. St. Louis, 149 Mo. 122; Baustain v. Young et al., 152 Mo. 317; Young v. Webb City, 150 Mo. 342; Burleson v. Krouse, 64 Ill. 19; Elliott on Streets and Roads (2 Ed.), 631. (5) Defendant's motion in arrest of judgment should have been sustained because plaintiff's petition does not state that defendant city knew of the defective walk in time to have repaired same before the accident. Badgley v. St. Louis, supra; Baustain v. Young, supra; Young v. Webb City, supra; Centralia v. Krouse, supra; Elliott on Streets and Roads, supra.

*Alden & McFadden* and *Fyke Bros., Snyder & Richardson* for respondent, filed argument.

SMITH, P. J.—This is an action which was brought to recover damages for personal injuries alleged to have been occasioned by the negligence of the defendant. The plaintiff had judgment in the court below and defendant appealed. The defendant assails the judgment on the ground that the petition fails to state facts sufficient to constitute a cause of action. The negligence upon which plaintiff bases her right to recover is alleged in the fifth paragraph of that pleading in this way, viz.: "defendant neglected its duty in this regard and negligently permitted said sidewalk . . . to become and remain out of repair, and permitted some of the boards or planks of which said sidewalk was constructed to become and remain displaced, rotten and broken, so that holes existed in said sidewalk to such an extent that it became unsafe at said place for ordinary travel to such an extent as to endanger life and



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limb, and that defendant negligently permitted said sidewalk at said place to remain in such unsafe and dangerous condition by reason of *said defects for a long period of time prior and up to the* 15*th day of July,* 1901, *and at the time the injuries complained defendant knew, or by the exercise of ordinary care might have known, of the defective and dangerous condition of said sidewalk.*"

The fact that the defendant had either actual or constructive notice of the defect in the street at the time the accident happened is not *per se* sufficient to show liability. More is required to establish a *prima facie* case. Before the defendant can be held liable it must be alleged and shown that it not only had notice of the defect at the time of the accident, but that it had such notice a sufficient length of time before it happened to afford it a reasonable opportunity to repair and a refusal to do so. As to what would be a sufficient length of time in which to afford an opportunity to make needed repairs in any given case would depend upon the attending facts and circumstances of that case, and most generally would be an issue to be left to the jury. It may thus be seen that the allegation while defective is good after verdict and judgment. Doherty v. Kansas City (decided at this term).

The defendant objects that the court erred in giving plaintiff's second and third instructions which told the jury that: (2) "It was the duty of the defendant city to maintain and keep its streets and sidewalks in a reasonably safe condition for the passage of persons traveling thereon, and not to erect barriers or signals to warn persons passing along said streets or sidewalks of defects or dangerous places, if any exist therein, and said defendant is liable in damages to any one who suffers injury by reason of neglect to perform this duty. A person traveling upon a street or sidewalk of said city has the right to assume that such street or sidewalk is in a reasonably safe condition, and to act upon that pre-

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sumption, relying upon the belief that such street or sidewalk is kept and maintained in a reasonably safe condition for travel thereon, and properly protected by barriers, or signals, to give warning of defects or dangerous places which may exist therein."

3. ". . . that the sidewalk at the place where the plaintiff claims to have been injured was defective, and that such defect, if any, had existed for such length of time that by the exercise of reasonable and ordinary care and prudence it should have been known to the officers or agents of said city whose duty it was to keep said sidewalk in proper repair and condition, and that at the time said plaintiff claims to have been injured there was no barrier, or signal, to prevent persons traveling upon said sidewalk from crossing said place, or to warn them of danger in crossing, or attempting to cross said place, and do further believe from the evidence that said plaintiff while traveling upon and along said sidewalk in an ordinarily careful and prudent manner stepped into a hole in said sidewalk and was thereby injured, then the plaintiff will be entitled to recover from the defendant herein such damages as the evidence shows she has sustained by reason of such injury, not exceeding the amount claimed in her petition, viz: $5,000."

One of the objections urged is the same as that to the petition: that is to say, that they did not require the jury to find that defendant had notice of the defect in the sidewalk in time to have repaired it before the accident happened. This objection, we think, is insuperable. And the other urged is, that they—the instructions—declared as a matter of law that the failure to erect a barrier or signal at the place where plaintiff was injured to prevent persons from traveling upon the sidewalk and from crossing said place, or to warn them of danger in doing so, was negligence. There was nothing either in the petition or evidence to authorize this expression of the law. There was no ordinance of

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defendant introduced in evidence which imposed upon it the duty to keep the place where the plaintiff was injured guarded or lighted and the instruction declaring such to have been defendant's duty was erroneous. Campbell v. Stanberry, 85 Mo. App. 159. Certainly such omission is not negligence *per se;* whether such omission will in any given case amount to negligence is for the jury to determine from all the circumstances. Staples v. Canton, 69 Mo. 592.

The instructions in referring to signals and barriers departed from the negligence specified in the petition and besides were without any evidence to support them. For these reasons they were vicious and should not have been given.

It is suggested by the plaintiff, even though such instructions were erroneous, the error was not prejudicial. In the absence of a satisfactory showing that error is harmless we must conclude that it is prejudicial to the party against whom it is committed. Skinner v. Stifel, 55 Mo. App. 9; Camp v. Railway, 94 Mo. App. 284; Doyle v. Trust Co., 140 Mo. 1. We are not satisfied that these instructions, telling the jury that it was the duty of the defendant to erect a signal or guard at the *locus in quo* and if it failed to perform that duty it was guilty of negligence, were not misleading and prejudicial.

The judgment will accordingly be reversed and the cause remanded. All concur.

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# DRUMM-FLATO COMMISSION COMPANY, Respondent, v. GERLACK BANK, Appellant.

**Kansas City Court of Appeals, March 7, 1904.**

1. **COSTS: Bill of Exceptions: Stenographer's Notes: Statute.** Section 10115, Revised Statutes 1899, does not authorize a fee to a stenographer for preparing a bill of exceptions which fee can be taxed as costs. It only provides a fee for the copy of the settled bill of exceptions, and that only when it becomes necessary to present a copy thereof to the appellate court.

2. ———: ———: ———: **Appellate Practice.** There is no law authorizing a stenographer to make a bill of exceptions at the request of either party, nor can a recovering appellant recover the expense of making his bill of exceptions.

3. ———: ———: **Appellate Practice.** The costs incurred in making a copy of the bill of exceptions can not be taxed against the respondent where the appeal is taken in the short form.

Appeal from Jackson Circuit Court.—*Hon. J. H. Slover,* Judge.

REVERSED.

*Elijah Robinson* for appellant.

(1) There is nothing better settled than that, in this State, nothing can be taxed as costs except what is specially provided by the statute. Steel v. Wear, 54 Mo. 531; Shed v. Railroad, 67 Mo. 687; Houts v. McCluney, 102 Mo. 13. (2) All statutes relating to costs must be strictly construed. Murphy case, 22 Mo. App. 476; Ford v. Railroad, 29 Mo. App. 616; Green case, 40 Mo. App. 491; Ring v. Paint and Glass Co., 46 Mo. App. 374; State v. McCracken, 60 Mo. App. 650; State v. Seibert, 130 Mo. 202; Baldwin v. Boulware, 82 Mo. App. 321; Jackson County v. Stone, 168 Mo. 577. (3) No person is entitled to have anything taxed as costs unless

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he can point to some particular statute authorizing the taxation of the same. Shed v. Railroad, 67 Mo. 687; Ring v. P. & G. Co., 46 Mo. App. 374; Wilson v. Ruthrauff, 87 Mo. App. 226; Hecht v. Heimann, 81 Mo. App. 370. (4) It can not be contended that the item upon which this judgment was rendered comes within any statutory provision.

*Botsford, Deatherage & Young* for respondent, submitted argument.

BROADDUS, J.—This cause was tried on its merits in the circuit court where defendant prevailed, but which on appeal to this court was reversed and remanded. The appeal was taken in the short or skeleton form and was heard and determined upon an abstract of the record. The plaintiff paid the official stenographer $115 for a copy of his notes with copies of the motions for new trial and in arrest of judgment and all other matters necessary to form a bill of exceptions, which was signed by the judge and constituted in fact the bill of exceptions in the case.

The court sustained plaintiff's motion to have said sum taxed in his favor against defendant.

Plaintiff contends that it was entitled to the sum so paid as costs as provided by section 10115, Revised Statutes 1899. Said section does not provide a fee to the stenographer for preparing a bill of exceptions as costs to be taxed against the losing party. It only provides for a fee for a copy of a bill of exceptions after the same has been settled to be so taxed, and then only when it becomes necessary to present a copy thereof to the appellate court for a review of the cause. There is no law authorizing or requiring the stenographer to prepare a bill of exceptions at the request of a party to a suit; and there is not and never has been any statute authorizing an allowance for costs in favor of an appellant, who recovers on an appeal, for the expense

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of making his bill of exceptions. He may avail himself of a copy of the stenographer's notes, but it will be at his own costs. It may be proper also to state that in the first place, had the said costs been incurred in making a copy of the bill of exceptions in the cause, it would not have been taxable against defendant as the appeal was taken on the short form and heard on abstract of record, there was no necessity for such copy.

Section 813, Code of Civil Procedure provides in what cases it shall be necessary to have a transcript of the record on appeal. The cause is reversed.

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EUGENE SULLIVAN, Respondent, v. ALBERT LUECK, Appellant.

**Kansas City Court of Appeals, March 7, 1904.**

1. **LANDLORD AND TENANT: Purchaser's Action for Possession: Statement: Statute: Surplusage.** A statement before a justice of the peace is held to aver every fact required by section 4138, Revised Statutes 1899, and on the conceded facts plaintiff was entitled to recover possession; and the fact that the statement prayed for recovery was mere surplusage and could not defeat his recovery.

2. **———: ———: Payment of Rent to Grantor: Notice.** The fact that after the transfer by the landlord to the purchaser the tenant paid rent to the landlord can not defeat the purchaser's right to recover possession when the tenant has been notified to pay rent to the purchaser.

Appeal from Pettis Circuit Court.—*Hon. Geo. F. Longan*, Judge.

AFFIRMED.

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*John D. Bohling* for defendant.

(1) The court erred in refusing the defendant's first instruction in the nature of a demurrer to the evidence. Because the allegations of the complaint bring the case clearly within the provisions of section 4131 of the statute of 1899. Revised Statutes 1899, secs. 4131, 4136, 4137 and 4138; Duke v. Compton, 49 Mo. App. 310; Winkelmeier v. Katzenburger, 77 Mo. App. 220. (2) The court erred in refusing said instruction for the reason, that the evidence shows that at the time the demand for rent was made and the deed exhibited to the defendant he owed no rent. Revised Statutes 1899, sec. 4137.

*John Cashman* for respondent.

(1) The complaint follows the positive command of the statute to the letter. R. S. 1899, sec. 4138; Vaughn v. Locke, 27 Mo. 290; Cook et al. v. Decker, 63 Mo. 328; State ex rel. v. Allen, 45 Mo. App. 551; Logan v. Byers, 79 Mo. App. 559; Mooers v. Martin, 23 Mo. App. 645; Welch v. Ashby, 88 Mo. App. 400. (2) The fact that rent and possession are both asked for in the prayer is immaterial. The prayer is not a part of the statement of the cause of action. McGrew v. Railway, 87 Mo. App. 250; State ex rel. v. Horton L. S. L. Co., 161 Mo. 664; Dickey v. Insurance Assn., 82 Mo. App. 372. (3) All rent that became due after the purchase of the land by plaintiff became his absolutely upon giving notice to defendant of his intention to claim the same. After notice the defendant paid the rent to Eliza Sullivan at his own peril, and in defiance of plaintiff's legal rights in the premises. R. S. 1899, section 4136; Page v. Culver, 55 Mo. App. 606; Zeysing v. Welbourf, 42 Mo. App. 352; Smith v. Aude, 46 Mo. App. 631; Bradford v. Tilly, 65 Mo. App. 181; Bonnell v. Pack, 79 Mo. App. 496; Gray v. Rogers,

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30 Mo. 258; Stevenson v. Hancock, 72 Mo. 612; Winfrey v. Work, 75 Mo. 55.

SMITH, P. J.—Eliza Sullivan was the owner of a small farm which she leased to the defendant for the term of three years and by the provisions of the lease the rent thereby reserved was payable semiannually, "one-half to be paid in August and the other half before the year expires, from March 1, 1902, to March 1, 1905." On November 10, 1902, Mrs. Sullivan by deed of that date conveyed the leased land to defendant. In the following month (December), the plaintiff notified the defendant of his acquisition of the title to said land so leased and that he claimed the rent to become due, the latter's lease from Mrs. Sullivan, on March 1, 1903. On this last mentioned date the plaintiff exhibited his said deed to the defendant accompanying such exhibition with a demand of payment of the rent which had accrued since his purchase, but the payment of which was refused by the latter. It is conceded that the defendant, after he had been notified by plaintiff that he had purchased the leased land and claimed the rent thereafter to become due under the said lease, paid to Mrs. Sullivan the semiannual rent falling due under his lease from her before March, 1903—the date of the expiration of the rental year.

This action was commenced before a justice of the peace on March 3, 1903. The complaint in its statement of facts conformed to the requirements of section 4138. As far as we are able to discover, every fact required by that section is therein fully stated. The statement of the constitutive facts is followed by a prayer for judgment for $37.50, the semiannual rent due under the lease on March 1, 1903, and for restitution of the premises.

It will be seen by reference to sections 4136, 4137 and 4138, Revised Statutes, that it is there provided

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that, where any person purchases land occupied at the time of such purchase by any tenant who shall at any time thereafter fail to pay the rent to such purchaser, then such purchaser shall have the right upon such failure to commence his action to recover possession, but that before such action shall be commenced such purchaser shall make a demand of rent and at the time of making such demand he shall exhibit to the tenant the deed under which he claims title, and if payment be then refused he may commence the action aforesaid. The plaintiff both alleged and showed at the trial that the defendant, the party in possession, leased from Mrs. Sullivan who claimed title to the land by deed, and that the former had acquired her title by a deed regularly acknowledged.

The plaintiff was entitled on the conceded facts to recover possession and the trial court so adjudged. It is difficult to see how the court could have given any other judgment. The mere fact that there was a prayer in the concluding part of the complaint for the rent then due under the terms of the lease could make no difference. The prayer for the recovery of the possession was all that was required. The plaintiff prayed for too much—more than he was entitled to have adjudged to him; but it is incontrovertibly true that the facts stated in the complaint, if found, warranted the judgment for the possession. The prayer for more than plaintiff was entitled to was but a mere superfluity that did not injure anyone. *Surplusagium non nocet.* The defendant as the tenant of Mrs. Sullivan refused to attorn to the plaintiff, her grantee, and refused to pay the rent to him, although he made a demand therefor accompanied by an exhibition of his deed. The remedy afforded the plaintiff by the statute went no further than to allow him to recover the possession. Duke v. Compton, 49 Mo. App. 304; Anselm v. Groby, 62 Mo. App. 421; Winkelmeier v. Katzenburger, 77 Mo. App. 117. The statement of facts set forth in the complaint

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clearly shows that the action was based upon sections 4136, 4137 and not upon sections 4130, 4131, Revised Statutes, as defendant contends.

The concluded fact that defendant paid Mrs. Sullivan the semiannual rent falling due March 1, 1903, is no defense to the action, for the further fact is conceded that he was notified prior to such payment that the plaintiff had purchased the land of his lessor and claimed the rent thereafter to accrue. He was not required to pay the rent to his lessor or her grantee before March 1, 1903, and if he paid it to her with notice of the purchase by plaintiff he did so at his peril. His payment was in fraud of the plaintiff's rights and can not be invoked as a defense to defeat the latter's action against him for the recovery of the possession. He is in no better situation than he would have been had he not paid the rent at all.

It follows that the court committed no error in declining to give either of the defendant's instructions.

The judgment will be affirmed. All concur.

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## FREDERICK C. LAUN et al., Appellants, v. EDWARD H. PONATH et al., Respondents.

**Kansas City Court of Appeals, March 7, 1904.**

1. **TRIAL PRACTICE: Continuance: Court's Discretion.** The granting of a continuance is a matter resting in the sound discretion of the trial court, which has no right to arbitrarily refuse a continuance.

2. **———: ———: ———: Diligence.** In a proceeding to enjoin a foreclosure of a deed of trust securing certain notes, the answer represented that the notes were hypothecated with one H. Before the trial plaintiff notified the defendant to produce the notes at the trial. This, defendant reported at the trial he could not do, because H who was present in court held them as collateral. Plaintiff asked a continuance because of defendant's failure. *Held*, plaintiff showed no diligence and there was no abuse of the court's discretion in refusing a continuance.

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Appeal from Osage Circuit Court.—*Hon. John W. McElhinney*, Judge.

AFFIRMED.

*T. M. & C. H. Jones* and *Crites & Garrison* for appellants.

(1) The court erred in overruling the application for a continuance filed by the appellants in this case. R. S. 1899, sec. 682; Tunstal v. Hamilton, 8 Mo. 500; Barnum v. Adams, 31 Mo. 532; State v. Lewis, 74 Mo. 222; State v. Anderson, 96 Mo. 241; State v. Maddox, 117 Mo. 667; Alt v. Grosclose, 61 Mo. App. 409; Shoe Co. v. Hilig, 70 Mo. App. 308; State v. Dewitt, 152 Mo. 85; Campbell v. McCaskell, 88 Mo. App. 47. (2) The materiality of the evidence. Campbell v. McCaskell, 88 Mo. App. 47; Shoe Co. v. Hilig, 70 Mo. App. 409. (3) After filing their suit the plaintiffs in order to insure the presence of the original note to be used in evidence on the trial of the cause, served notice upon defendant Ponath.

*C. D. Corum* for respondent.

(1) Defendants say that they deligently sought to prepare for the trial of this case. The record does not sustain that assertion. (2) The evidence offered conclusively shows that the note was in the possession of some person other than attorney Terrell or the defendant, Ponath, and the record further shows that no effort whatever was made to procure the note from such other persons. It was essential that the application should show that such effort had been made. Bartholomew v. Campbell, 56 Mo. 119. (3) If plaintiff desired to enforce the production of the note and deed of trust, our statute and the decision thereunder, have provided a method of procedure. This method should have been

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pursued. R. S. 1889, sec. 737, 738 and 741; Deil v. Railroad, 37 Mo. App. 459; Hill v. Meyer, 47 Mo. 595; Jeffries v. Flint, 55 Mo. 29.

BROADDUS, J.—In August, 1902, the plaintiffs commenced an injunction suit to restrain defendants from proceeding to foreclose a certain deed of trust which plaintiff Laun had executed to secure the payment of certain notes payable to defendant Ponath. Among other allegations was one that the said notes were barred by the statute of limitations. A temporary injunction was issued by two judges of the county court. The proceedings were begun in the Maries county circuit court, and when the case came up for hearing the defendants moved to dissolve the injunction alleging, among other matters, the insufficiency of the bond. The court refused to sustain the motion to dissolve but made an order upon plaintiffs to give a new bond to be filed within ten days. Within the time fixed the plaintiffs filed the required bond. But before this was done there had been an order changing the venue to the Osage county circuit court. Before the beginning of the term of court in the latter county the plaintiff gave the defendant, Ponath, notice to produce the said notes at the coming trial. The purpose for which the notes were to be used was to show if the credits on them had prevented the bar of the statute of limitations, the notes themselves having been executed for more than ten years. When the case came up in the last named court the bond for injunction for some cause was held invalid. Before proceeding to trial it appeared that the defendant had not produced the notes, giving as an excuse for not doing so that he had hypothecated them to one, Mrs. Anna P. Holsman, who was then in court. The plaintiff then made application for a continuance on the ground of surprise that the notes had not been produced, alleging their materiality. In defendant's answer he stated the fact that said notes had been so

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hypothecated to Mrs. Holsman. After hearing evidence, the object of which was to show that defendant had not hypothecated the notes, the court overruled plaintiffs' application for a continuance; and as they refused to further proceed in the trial, the court dismissed the case for want of prosecution and the plaintiffs appealed. The plaintiffs claim that the court erred in overruling their application for a continuance and in rejecting their injunction bond.

The order upon which plaintiffs were to file a new injunction bond within ten days was made before the venue of the case was changed to Osage county. The order was complied with but the court struck it out, it is asserted by plaintiffs, because it was filed after the order for the change of venue. When the order was made by the circuit court of Maries county that court had jurisdiction and the order was binding upon plaintiffs, notwithstanding the after change of venue. It is a matter too plain for discussion.

But the merit of the appeal is in the judgment of the court dismissing the case for want of prosecution. It is conceded law that the granting of a continuance to a party litigant is a matter resting in the sound discretion of the court. A trial court has no right to arbitrarily refuse a continuance to a party to a suit where there has been due diligence in preparing for trial and when it would work injustice or oppression. State v. Hollenscheit, 61 Mo. 302; State v. Whitton, 68 Mo. 95.

In view of the circumstances that plaintiffs had been notified by defendant's answer filed in the case that the notes in question were hypothecated and in the possession of Mrs. Holsman, and further that she was then in court, it seems that they exercised little or no diligence whatever in procuring said evidence. They should have had Mrs. Holsman served with a *subpoena duces tecum* to produce the notes. But they made no such effort. To a man of ordinary caution the notice of the whereabouts of said notes would have caused him to

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have taken the proper means to have had them produced. There was no abuse of discretion in the court in refusing to grant plaintiffs a continuance; on the contrary, we think it was wisely exercised.

With this holding, the error committed by the circuit court in rejecting said injunction bond has no practical bearing.

The cause is affirmed. All concur.

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THE STATE OF MISSOURI ex rel. I. V. McPHERSON, Prosecuting Attorney, etc., Appellant, v. ST. LOUIS and SAN FRANCISCO RAILROAD CO., Respondent.

**Kansas City Court of Appeals, March 7, 1904.**

1. **RAILROADS: Stop at Intersection: Statutory Construction: Penalty.** A penal statute must be strictly construed so as not to enlarge the liability it imposes, nor allow recovery unless the party seeking such brings himself strictly within its terms.

2. ———: ———: ———: ———. Section 1075, Revised Statutes 1899, requires railroad passenger carriers to stop their passenger trains at the intersection of other railroads a sufficient time to transfer passengers, baggage, etc., to the train: of the intersecting road; and its object was to afford facilities for persons traveling on one railroad and destined to points on an intersecting road.

3. ———: ———: ———: ———. To establish a case under said section the relator must prove that passengers, baggage, mail and express freight for the intersecting road was at the junction on the day mentioned and that the respondent road did not stop its train a sufficient time to accomplish the transfer; and mere proof that the trains of respondent road passed without stopping is insufficient.

4. ———: ———: ———: ———. The construction of a statute should accord with reason and the reason should prevail over the letter and general terms should be limited so as not to lead to injustice or oppression.

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**5. ——: ——: ——: ——: Evidence. It is held that neither evidence introduced nor that refused was sufficient to make out a case under the statute.**

Appeal from Dade Circuit Court.—*Hon. H. C. Timmonds,* Judge.

Affirmed.

*R. H. Davis, I. V. McPherson* and *Edw. J. White* for plaintiff.

(1) The court excluded competent evidence offered by the plaintiff. Mumford v. Wilson, 19 Mo. 669; Donovan v. Railroad, 158 Mass. 450; Briggs v. Grand Trunk Co., 24 N. C. Q. B. 510; State ex rel. v. Railroad, 149 Mo. 104; Railroad v. Owens, 1 Tex. App. 163; Gulf Co. v. Wright, 2 Tex. Civ. App. 463, 21 S. W. 399. (2) The defendant should have been compelled to produce its train sheets, showing the dates on which trains five an six failed to stop at Aurora. Greenburg v. Railroad, 23 Ind. App. 141, 55 N. E. 46; State ex rel. v. Railroad, 70 Mo. App. 635; LaFountaine v. Ass'n Underwriters, 83 N. C. 132; Rice on Evidence, 309; Ex Parte Busket, 106 Mo. 602; State v. Pomeroy, 130 Mo. 489; State v. Davis, 108 Mo. 666; State ex rel. v. Hardware Company, 109 Mo. 124. (3) The court should have submitted the case to the jury. Gladson v. Minnesota, 166 U. S. 427; Railroad v. People of New York, 165 U. S. 628; Lake Shore Co. v. Ohio, 173 U. S. 285; Stone v. Trust Co., 116 U. S. 307; Railroad v. Jacobsin, 179 U. S. 287; Stone v. Railroad, 116 U. S. 347; Wash. Co. v. Brown, 17 Wall. 445; State v. Williams, 44 Mo. App. 302; State v. Railroad, 83 Mo. 144; Logan v. Railroad, 74 Ga. 684; Phil. etc. Co. v. Catawissa Co., 53 Pa. St. 20; Railroad v. Denver, etc. Co., 110 U. S. 667; Lamb v. Railroad, 147 Mo. 171.

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*L. F. Parker, E. P. Mann* and *J. T. Woodruff* for respondent.

(1) This case is, in its nature, criminal, and the defendant can not be required to give evidence which would in any way tend to subject it to a penalty or forfeiture. The rule is laid down in 26 Encyclopedia of Pleading and Practice, page 743. 29 Am. and Eng. Enc. of Law, 824; Johnson v. Donaldson, 3 Fed. 22; Swan v. Mast, 63 Fed. 623; Story Eq. Plead., Clause 607, page 846; 1 Greenleaf on Ev., section 453. (2) The third and last error complained of is that the court should have submitted the case to the jury. In other words, should not have sustained the demurrer to his evidence at the close of plaintiff's case. To support this contention appellant cites: Gladson v. Minn., 166 U. S. 427; Railroad v. People, 165 U. S. 628; Railroad v. Ohio, 173 U. S. 285; Stone v. T. R. Co., 116 U. S. 307. All of these cases relate to the question of whether or not the statute in question, as applied to the facts in this case, is in violation of that provision of the federal constitution giving Congress the exclusive right to regulate interstate commerce. (3) If, as we have all along supposed, the court sustained the demurrer at the close of the plaintiff's case, on the ground that his evidence did not entitle him to go to the jury, then we should scrutinize his evidence, and see whether the ruling was proper. 13 Am. and Eng. Enc. of Law, 55, 491.

SMITH, P. J.—This is an action brought by the State at the relation of the prosecuting attorney to recover the penalty prescribed by section 1075, Revised Statutes. It is stated and not denied that the petition was in one hundred and seventy-eight counts; that each count was identical with that copied into the record here, except as to date. The statutory violations for which



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the penalty is in each count demanded took place between March 1 and June 30, 1901 and December 1, 1901 and January 27, 1902, or, one on each day between the dates just stated.

The count of the petition just referred to alleged that on the first day of March, 1901, it was the legal duty of the defendant, under the provisions of section 1075, of the Revised Statutes of the State of Missouri, for 1899, to stop all its trains carrying passengers, at said city of Aurora, at said intersection and connection of the defendant's said track with the said track of the said Kansas City, Fort Scott & Memphis Railroad, a sufficient length of time to allow the transfer of passengers, personal baggage, mails and express freight from the passenger trains of the defendant, to the said Kansas City, Fort Scott & Memphis Railroad and from the passenger train of the said Kansas City, Fort Scott & Memphis Railroad, to the passenger trains of the defendant, two passenger trains being on the said day scheduled to run, and being then and there run by the said Kansas City, Fort Scott & Memphis Railroad, from the said city of Aurora to the city of Greenfield, Missouri, and connecting at Aurora, with the passenger trains on defendant's road.

Supplementing these allegations was that to the effect that the defendant had committed a breach of the statutory duty therein alleged, in consequence of which it became liable to forfeit and pay to the State for the use of the school fund of Lawrence county, the sum of twenty-five dollars, etc.

The answer upon which the case was tried was a general denial. At the conclusion of the relator's evidence the court, at the request of the respondent, gave an instruction in the nature of a demurrer thereto; and thereupon the relator suffered a nonsuit, and after an unsuccessful motion to set the same aside prosecuted his appeal here.

The statute—section 1075, supra—on which the

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action is founded provides that: "Every railroad corporation of this State which now is or may hereafter be, engaged in the transportation of passengers or property, . . . *are hereby required to stop all trains carrying passengers, at the junction or intersection of other railroads a sufficient length of time to allow the transfer of passengers, personal baggage, mails and express freight from the trains of railroads so connecting or intersecting;* . . . and they shall be compelled to receive all passengers and freight from such connecting or intersecting roads whenever the same shall be delivered to them. Every railroad corporation or company which shall fail, neglect or refuse to comply with any or either one of the provisions of this section from and after the first day of July, 1885, shall, for each day said corporation or railroad refuses, neglects or fails to comply therewith after said day, forfeit and pay the sum of twenty-five dollars, which may be recovered in the name of the State of Missouri, to the use of the school fund of the county wherein said crossing is situate. . . ."

As to whether or not the statutory provision just quoted as applied to the facts of this case is violative of section 8, article 1, of the constitution of the United States regulating commerce among the several States is a question that is not brought before us for decision by the appeal; and if it were we would not consider it because without our jurisdiction. But whether or not on the evidence adduced by the relator he was entitled to a submission to the jury is a question which we are obliged to decide.

The foregoing is a penal statute. It enjoins upon railroad companies the duty to do certain things which, if not done, subjects them to the payment of a fixed penalty; and being penal, it must be strictly construed so as not to enlarge the liability it imposes, nor allow a recovery under it unless the party seeking it brings his case strictly within the terms or conditions authorizing

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it. State v. Railway, 83 Mo. l. c. 148; Parish v. Railway, 63 Mo. 284.

The evident purpose the legislature had in view in its enactment requiring railroad passenger carriers to stop all their passenger trains at the junction or intersection of other railroads a sufficient length of time to allow the transfer of passengers, personal baggage, mails and express freight from the trains of such intersecting railroads, was to afford facilities to persons travelling on one railroad and destined to some point on another intersecting it. State v. Railway, 83 Mo. supra; Logan v. Railway, 77 Mo. 663.

The evidence adduced at the trial tends to show that the defendant road was intersected by the Kansas City, Fort Scott & Memphis Railroad at Aurora, in this State, and that the defendant ran three trains each way each day which stopped regularly at Aurora Junction to receive passengers, baggage, mail and express freight from such intersecting raiload. It further tended to show that defendant ran a train each way each day known as the Texas Limited and St. Louis Limited, which was not scheduled to stop at Aurora Junction. It was in effect conceded that the defendant's three trains which stopped regularly at Aurora took care of and accommodated all the business originating upon or destined to points on said intersecting railroad so that there was no occasion for said limited trains which followed them to stop at Aurora. It is true that it appears from the testimony of respondent's conductor, engineer and other employees that for many of the days included in the two periods of time specified in the petition that it—respondent—did not stop its said limited trains at Aurora; but was this sufficient to establish a prima facie case? To establish such a case it devolved on the relator to prove that passengers, personal baggage, mails and express freight from said intersecting railroad was at Aurora on a day mentioned in one of the counts of the petition and that the said limited trains

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did not then and there stop a sufficient length of time to accomplish the transfer from the former to the latter.

The construction of a statute should accord with reason and common sense and should not require unreasonable things. Cole v. Railroad, 47 Mo. App. 624. The reason of the law should prevail over its letter, and general terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence, the presumption being that the legislature intended no such anomalous results. Verdin v. St. Louis, 131 Mo. 26. A construction of this statute which would require the respondent to stop all of its trains at Aurora Junction, whether or not passengers, baggage, mail and express freight from its intersecting railroad is there waiting to be transferred and carried by it further along on its line would be an unreasonable and oppressive requirement. Suppose the respondent should run, as it may do, ten passenger trains each way each day over its road. Suppose, further, that the intersecting road should only run one and on its arrival at Aurora the respondent should without delay have trains there ready to receive the passengers, baggage, mail and express freight from it so as to leave nothing there for the other nine trains to carry. And suppose, further that three of its ten trains stopping there, including that just referred to, afforded ample facilities for the local travel to and from there; would any court say that a reasonable construction of the terms of this statute would require the remainder of such trains to stop, too, though there was nothing for them to do? In a State like this where the great through lines of railway running north and south and east and west so often intersect each other, and are intersected by local roads a construction of the statute here requiring that they stop all of their trains at each of said intersections, whether or not there be any persons, baggage, mails or express matter from the intersecting roads to be carried by them would render the rapid transit of per-

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sons, property and the mails from the east to the west and from the north to the south, and the reverse, impossible; and this the legislature, by the statute, never intended to do.

Neither the evidence introduced nor that rejected tended to prove that on any day within either of the periods of time specified in either count of the petition the respondent failed to stop one of its trains at Aurora Junction when there was any passenger, baggage, mail or express matter from the connecting railroad to be transferred and carried on either of such trains not stopping and therefore the proof was insufficient to make out a case under the statute. The fact that a witness testified that he had bought a ticket from an Arkansas point to Aurora, where he had lived and that he was required to leave the limited train before reaching Aurora and to take a local train that stopped at Aurora, in the light of Logan v. Railway, supra, could have no bearing on the case.

It is difficult to see how the action of the court in excluding from the evidence the petition to compel the production of the train sheets, etc., the train dispatches, record, time tables, statements of respondent's agents, etc., harmed the relator since such excluded evidence did not supply the deficiency to which we have previously referred. If this excluded evidence had been admitted it would have showed no more than that said trains did not stop at Aurora at the dates alleged in the petition and even with such excluded evidence in, the result would not have been different.

In none of the rulings of the court in excluding evidence do we discover any error justifying a reversal of the judgment which must accordingly be affirmed. All concur.

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W. G. LANE, Respondent, v. LOGAN GRAIN CO. et al., Appellants.

**Kansas City Court of Appeals, March 7, 1904.**

**SALES: Puts and Calls: Option Dealing: Gaming.** A "put" contract set out in the opinion is considered in connection with certain evidence and held to be an option without an actual intent to deliver the grain mentioned, and, therefore, was mere gambling on the difference between the market and the contract prices, and is a stench in the nostrils of the statute.

Appeal from Jackson Circuit Court.—*Hon. James Gibson,* Judge.

REVERSED.

*I. P. Ryland* and *Lester W. Hall* for appellants.

(1) The instrument for which the defendants gave their check, was an option contract and was absolutely void. Revised Statutes 1899, sec. 2337; Revised Statutes 1899, sec. 2342; Connor v. Black, 119 Mo. 126; Schreiver, Flock & Co. v. Isaac Orr, Admr., 55 Mo. App. 406; Mulford v. Caesar, 53 Mo. App. 263; Crawford v. Spencer, 92 Mo. 498; Hill v. Johnson, 38 Mo. App. 383; Scott v. Brown, 54 Mo. App. 606; Williams v. Tiedeman, 6 Mo. App. 269; Kent v. Witenberger, 13 Mo. App. 503; Ream v. Hamilton, 15 Mo. App. 577; McLean v. Stuve, 15 Mo. App. 317; Van Blarcon v. Donovan, 16 Mo. App. 535; Johnson v. Kaume, 21 Mo. App. 22; Connor v. Heman, 44 Mo. App. 346; Pickering v. Cease, 79 Ill. 328; Pixley v. Boynton, 79 Ill. 351; Miller v. Bensley & Wagner, 20 Ill. App. 532; Brown, Graves & Co. v. Alexander, 29 Ill. App. 626; Wheeler v. McDermid, 36 Ill. App. 179; Watte v. Costello, 40 Ill. App. 307; Peace v. Rice, 142 U. S. 28; Miles v. Andrews, 40 Ill.

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App. 155; Whiteside v. Hunt, 97 Ind. 191; Bank v. Packing Co., 66 Iowa 41; Billingslea v. Smith, 77 Md. 504; Mohr v. Meiser, 47 Minn. 228; Rudolph v. Winters, 7 Neb. 125; Flagg v. Baldwin, 38 N. J. Eq. 219; West v. Wright, 86 Hun 436; Pickering v. Chase, 7 Ohio 156; Flagg v. Gilpin, 7 R. I. 10; Dunn v. Bell, 85 Tenn. 581; Wall v. Schneider, 59 Wis. 197. (2) Therefore there was no consideration for the appellant's check and no recovery could be had thereon. Downing v. Ringer, 7 Mo. 585; Brick v. Seal, 45 Mo. App. 475; Friend v. Porter, 50 Mo. App. 89.

*Thos. H. & Verne D. Edwards* for respondent.

"When parties are on an equal footing, the law will presume that a man will take care of himself. He can not go about without care or judgment relying on the law to guide and protect him in his dealings with his fellowmen . . . and the courts are not required to protect men—grown men—from their own folly and cupidity." Harrison v. Waldron, 89 Mo. App. 164.

SMITH, P. J.—This is an action which was brought before a justice of the peace to recover the amount of a check for $225.00 given by the defendant to plaintiff on which payment had been stopped. The check had been given in payment for the following written instrument:

"Kansas City, Mo., Jan. 4, 1902.

"I have this day sold to Theodore Nathan for account of C. N. Purcell ten (10) Puts, K. C. May wheat (75c.) seventy-five cents. Good until close of market, May 31st, 1902.

"G. L. BRINKMAN.

"It is understood that unless the original buyer of this privilege is a member of the Kansas City Board of Trade that trades against it in the Kansas City market shall be made through the undersigned.

"THEODORE NATHAN, Put and Call Broker."

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On the back of this is the following:

"C. N. Purcell, without recourse."

Shortly after the Logan Grain Company had given its check in payment for the above instrument, Mr. Logan, the president of the company, discovered that Mr. Brinkman, who had signed the "put" contract was dangerously ill and was not represented on the Board of Trade and that this instrument was therefore entirely valueless. Mr. Logan saw Mr. Lane and told him that he had learned that the "put" contract which he had bought was entirely worthless and demanded the return of his check, and offered to give up the "put" contract. Mr. Lane refused to give up the check. Mr. Logan then called up the City National Bank by telephone and stopped payment on the check.

There was a trial in the circuit court where plaintiff had judgment and defendants appealed. At the conclusion of the evidence the defendants interposed a demurrer thereto which was by the court denied and so the appeal brings before us the question whether or not on the evidence the plaintiff was entitled to go to the jury.

Section 2337, Revised Statutes, provided that "All purchases and sales or pretended purchases and sales or *contracts* and *agreements* for the purchase and sale of . . . *grain*, either on margin or otherwise, without any intention of receiving and paying for the property so bought or sold and all buying or selling or pretended buying or selling of such property on margins or optional delivery, when the party selling the same or offering to sell the same does not intend to have the full amount of the property on hand or under his control to deliver upon such sale or when the party buying any of such property or offering to buy the same does not intend actually to receive the full amount of the same if purchased, are hereby declared to be gambling and unlawful and the same are hereby prohibited.

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Section 2342, Revised Statutes, declares that "all contracts made in violation of sections 2337, 2338, 2339 and 2341 of this article shall be considered gambling contracts and shall be void."

This statute does not interdict the sale of any kind of personal property for future delivery which the seller may not at the time of the sale have on hand, if he intends to deliver it and has it on hand for that purpose at the time it is to be delivered under the contract of sale, but it expressly declares that the sale of any of the kinds of personal property therein mentioned without any intention of delivering it; and all buying or selling or pretended buying or selling of such property on margins or optional delivery, when the party selling the same does not intend to have the full amount of the property on hand or under his control to deliver upon such sale, to be gambling, unlawful and prohibited. Connor v. Black, 119 Mo. 126. It has been many times held in this State that in contracts for the sale of commodities in the future there must be an actual intention to deliver or receive the commodity and not an intention simply to settle the differences according to the fluctuations in the market prices of such commodity. Kent v. Wilenberger, 131 Mo. App. 503; Williams v. Tiedeman, 6 Mo. App. 269; Ream v. Hamilton, 15 Mo. App. 577; McLean v. Stuve, 15 Mo. App. 317; Van Blarcom v. Donovan, 16 Mo. App. 535; Johnson v. Kaune, 21 Mo. App. 22. And the true test as to whether a contract which contemplates a future dealing is valid or not is whether there be an intention to actually deliver or receive the commodity at some future time or whether the intention is to settle the difference according to the fluctuations in the market price. If there be an intention to deliver or receive the commodity the contract is valid; if there be no such intention it is not. This seems to be the generally recognized doctrine. Crawford v. Spencer, 92 Mo. 498; Scott v. Brown, 54 Mo. App. 606; Pearce v. Rice, 142 U. S. 28; Miles v. An-

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drews, 40 Ill. App. 155; Whiteside v. Hunt, 97 Ind. 191; First Nat'l Bank v. Oskaloosa Packing Co., 66 Iowa 41; Billingslea v. Smith, 77 Ind. 504; Mohr v. Meiser, 47 Minn. 228; Rudolph v. Winters, 7 Neb. 125; Flagg v. Baldwin, 38 N. J. Eq. 219; West v. Wright, 86 Hun 436; Pickering v. Chase, 7 Ohio Dec. 156; Flagg v. Gilpin, 7 R. I. 10; Dunn v. Bell, 85 Tenn. 581; Wall v. Schneider, 59 Wis. 197.

And as to whether or not it was the intent of a party to the contract that there should be no delivery of the commodity may be inferred from all the attending facts and circumstances disclosed by the evidence. Schreiner v. Flack, 55 Mo. App. 407.

The contract, here in issue, is that Brinkman sold to Purcell "ten puts K. C. May wheat, seventy-five cents. Good until close of Market May 31, 1902." A number of witnesses who for several years had been engaged in the transaction of grain business on the Kansas City Board of Trade were called and testified in substance that the contract here was that where the seller of it thereby sold the privilege of having wheat "put" to him at the price and within the time therein specified; that it gave the holder of it the option of selling to the seller of such contract, ten thousand bushels of May wheat at seventy-five cents a bushel; that if the market went one way the holder of the contract would exercise his option and if it went the other way he would not; that the contract was a "privilege" contract giving the holder the right to "put" wheat at a certain price within a specified time; that such contracts do not contemplate the actual delivery of the commodity but does contemplate settlements based on the differences between the market and contract prices. It appears from the evidence that it is the common understanding amongst grain dealers on the Board of Trade that "put" and "call" contracts do not contemplate the actual receipt and delivery of grain but rather speculative transactions, the settlement of

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which are to be determined by the differences arising from the fluctuation of the market price.

A statute of Illinois in scope very much as that quoted at the outset was held "not intended to prohibit the purchase or sale of grain with an option given to the purchaser to deliver or to the seller to receive within a time limited in the future but the option prohibited is defined in Pixley v. Boynton, 79 Ill. 351, to be 'put' or calls—a put is a privilege to deliver or not deliver grain or other commodity." Miller v. Bensley, 20 Ill. App. l. c. 530. It is clear that the contract here in issue was a "put" contract by the terms of which the seller sold to the buyer the privilege of selling to him, the seller, wheat at seventy-five cents a bushel within a specified time. It is manifest that this contract when read in the light of surrounding facts and circumstances did not require or contemplate a delivery of the grain sold. It was optionary with the holder of such contract whether he deliver it or not. There could be no intention to deliver when there is an option of this sort. The latter negates the former.

The purchaser of the "put" contract thereby secured the option to sell or not to sell the wheat at the price named within the time specified. If the price of wheat on the market during the specified period fell below seventy-five cents the purchaser or his assignee had the option to sell to him at the "put" contract price and receive from him the difference between the former and the latter. If the price of wheat during that period should not go below seventy-five cents then the holder of such contract would not sell and the seller of the contract would thereby be ahead in the deal thirty-five dollars received for taking the risk assumed by selling such contract. The evidence is overwhelming to the effect that the real object of the sale of the "put" contract or the privilege it granted was not to contract for the actual *delivery* in the future of the wheat but merely to speculate upon the rise and fall in prices and that it was

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understood by them at the time that the wheat to which the contract related was not to be delivered and that the transaction contemplated was to be closed only by the payment of the difference between the contract price and the market price at the time fixed for the execution of the contract. The transaction, from its inception, contemplated nothing more nor less than a gambling in differences and it was therefore a stench in the nostrils of the statute. Such a contract was void—it is nothing. It bound no one and was incapable of enforcements and it therefore follows that by its delivery to the defendants no legal consideration for the check passed to them. Friend v. Porter, 50 Mo. App. 89; Bick v. Seal, 45 Mo. App. 475. In no view of the case which we are able to take do we see that the plaintiff is entitled to recover. We feel justified from the almost undisputed evidence in holding as a matter of law that the plaintiff is not so entitled.

The defendant's instruction in the nature of a demurrer to the evidence should have been given.

The judgment must accordingly be reversed. All concur.

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## HELEN F. SMITH, Appellant, v. THE CITY OF WESTPORT et al., Respondents.

**Kansas City Court of Appeals, March 7, 1904.**

1. **TAXBILLS: Published Resolution: Grading: Statute.** A published resolution declaring the necessity of the paving of a certain street failed to describe the work of the necessary grading. The cost of the grading was taxed in the bills. *Held*, the bills were void since to create a lien on the citizen's property adherence to the statute must be had.

2. ———: **Notice: Contractors: Passage of Ordinance.** A city council has power to advertise for bids and contract for paving a street before passing an ordinance ordering the work to be done if such steps were taken by proper resolution.

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3. ——: **Contract: Time: Ordinance.** Though a city may extend the time for paving a street when the contract provides for a forfeiture for each day after the specified time, when the ordinance requires that the work shall be done in a definite time, the city council can not extend the time since it is the essence of the contract.

Appeal from Jackson Circuit Court.—*Hon. E. P. Gates*, Judge.

REVERSED AND REMANDED (*with directions*).

*C. H. Nearing* for appellants.

(1) The resolution declaring the work necessary did not include and describe the work of bringing the street to grade. (2) The notice to contractors was not published in some paper published in the city for one week, as required by law. (3) The work was not completed within the time required by contract and ordinance.

*Karnes, New & Krauthoff* for respondents; submitted lengthy argument.

BROADDUS, J.—This is a proceeding in equity to remove from the title of plaintiff's property the lien of certain taxbills issued by the city of Westport, a city of the fourth class, for the improvement of Holmes street between thirty-first and thirty-third streets on which her property faced.

On June 3, 1896, the city council adopted a resolution declaring that it was necessary that Holmes street between the streets named be macadamized and curbed, which resolution further declared that the general revenue fund of the city was not in condition to warrant an expenditure to bring the street to the established grade. On July 11, 1896, a notice to contractors that sealed proposals would be received by the city engineer until 5 o'clock p. m. Saturday, July 18, 1896, for grading, curbing and macadamizing the street in question, was pub-

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lished, and that plans and specifications could be seen at the office of the city clerk. On July 13, following, an ordinance was passed by the city council providing material, without terms and conditions of construction of the work, and on July 18, next thereafter, bids were open for the construction of the work. The only publication had of this notice to contractors after the passage of said ordinance was on said day when the bids of the contractor were opened. The last named ordinance has the following provision: "The work shall be completed within sixty days from the time a contract therefor binds and takes effect and shall be paid for in special taxbills issued against and upon the lands charged with the costs hereof according to law, which work the board of aldermen deem it necessary to have done." The finding and judgment were for the defendants.

The contract for the work was dated the seventeenth of August, 1896. It contains the following provisions as to time, viz.: "The work embraced in this contract shall begin within ten days after this contract binds and takes effect, and shall be prosecuted regularly and uninterruptedly thereafter (unless the engineer shall specifically direct otherwise in writing) with such force as to secure its full completion within sixty days from its confirmation. The limit of beginning, rate of progress, and time of completion being essential conditions of this contract."

The work not having been completed within the time provided in the contract, afterwards, on October 8, an ordinance was passed extending such time to January 1, 1897. The work was completed and accepted on December 17, 1896. Plaintiff contends that the taxbills are illegal for the following reasons: 1. Because the resolution declaring the work necessary did not include and describe the work of bringing the street to grade. 2. The notice to contractors was not published in some paper in the city for one week, as required by

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law. 3. The work was not completed within the time required by contract and ordinance.

The failure of the board of aldermen to describe the work of bringing the street to the established grade was an omission to perform a duty imposed upon cities of the fourth class by section 5988, Revised Statutes 1899. Said section was one of the charter provisions of the defendant city and its corporate acts must be performed in the manner directed by its charter. Nevada v. Eddy, 123 Mo. 546; Kirksville v. Coleman, 77 S. W. 120; Kansas City ex rel. v. Askew, 105 Mo. App. 84.

The ability of a city to create a lien on the property of a citizen rests exclusively in the adherence to the method prescribed by the ordinance in pursuance of the authority contained in the charter. Kiley v. Oppenheimer, 55 Mo. 376; State v. Bank, 45 Mo. 528. "Proceedings by which the citizen is to be divested of his property *in invitum* must be pursued." Fay v. Reed, 128 Cal. 357. The object of said section and of section 5989 is to inform the citizen whose property is to be affected the nature and extent of the contemplated improvements so that he may protest against it being done at his expense if he chooses to do so. And the resolution should omit nothing that the statute requires, or else it does not bind the property owners.

As the notice to contractors for bids for the work was published on July 11 and the ordinance was passed July 13, providing for method, terms and conditions of construction, and bids were opened July 18, plaintiff contends that the notice was not published according to law, as the only notice that was published after the passage of the said ordinance on the thirteenth of said month was published on the last named date. In other words, her contention is that there should have been one week's publication after said last named date whereas there was only five days. That could make no difference under the ruling in this State. "A city council has the power to advertise for bids and contract for paving a

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street before passing an ordinance ordering the work to be done if such steps were taken by proper resolution." Springfield v. Weaver, 137 Mo. 650.

The final contention is that the taxbills were void because the work was not completed within the time provided by the contract and by the ordinance. In Heman v. Gilliam, 171 Mo. 258, where there was a provision in the contract as to when the work should be completed, similar to that of the contract here, the court held that it was not a provision for a stated time within which the work should be completed, but for a reasonable time. See also Sparks v. Villa Rosa Land Co., 99 Mo. App. 489. But in neither of the last two named cases did the ordinances provide any specified time in which the work should be completed. Under the rule in Heman v. Gilliam, supra, the provision in the contract here as to the time when said work should be completed is to be construed as a reasonable time and not a fixed time—for the reason that it is specified that if the contractor does not complete the work within a specified time he shall forfeit a certain proportion of his pay for each day thereafter until he has so completed his work.

But here the ordinance requires that the work shall be completed in 60 days. In Barber Asphalt Co. v. Ridge, 169 Mo. 376, the court said: "We are clearly of the opinion that the city council had no authority to issue a valid taxbill for work which had not been done within the period prescribed under the ordinance which required it to be done, and to validate that which was void and incurable." To the same effect is McQuiddy v. Brannock, 70 Mo. App. 535. The time for the completion of the work was fixed by the ordinance and governs, and if the contract varies from it in that respect it is to be disregarded. Time therefore became of the essence of the contract and the failure of the contractor to complete his work within said time rendered the taxbills void. But it is insisted that the board of al-



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dermen waived the provision as to the time limit by extending it until January 1, 1897. Where time is not of the essence of the contract it may be waived, and courts do not enforce forfeitures against derelict parties in such cases. But here, as has been said, time being of the essence of the contract, the board of aldermen had no more power to waive it by extension than it had to waive anything else in said contract.

We hold that the taxbills are void for the reason given and the cause is reversed and remanded with directions to set aside the judgment heretofore entered and to enter a judgment in favor of plaintiff as prayed for in her petition. All concur.

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## ASTON, Respondent, v. ST. LOUIS TRANSIT COMPANY, Appellant.

St. Louis Court of Appeals, March 1, 1904.

1. **RATE OF SPEED: Expert Testimony Not Necessary to Show.** The velocity of a car or a train in motion, propelled by electric or steam power, does not have to be established by the testimony of experts; any one accustomed to riding on cars and seeing them run is a competent witness as to their speed.
2. **PRACTICE: Pleading and Proof.** A plaintiff can not allege one cause of action and recover upon the proof of another not stated, and when the plaintiff alleges specific acts of negligence, the evidence and the right of recovery will be confined to the specific acts charged.
3. **———: ———: Self Invited Error.** A party can not be heard to complain that the issues in the case on trial were widened beyond the range of the pleadings, where he has himself invited such a result by instructions asked on his own behalf.
4. **———: Carriers of Passengers: Burden of Proof.** Where a passenger, standing on the rear platform of a crowded street railway car, was thrown to the ground and injured by reason of the platform gate giving way, in a suit for injuries caused thereby, he made out a *prima facie* case by showing the happening of the accident; the burden was then upon the defendant to show facts which exonerated it from responsibility.

Appeal from Jefferson Circuit Court.—*Hon. Frank R. Dearing,* Judge.

AFFIRMED.

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*Byrns & Bean* and *Dinning & Hamel* for appellant.

(1) The court erred in admitting the opinions of plaintiff's several witnesses as to the rate of speed. Not one of them had ever made any observations as to the rate of speed of cars, and could therefore form no judgment on the subject. Without making such observations, they had not the knowledge which entitled them to express an opinion as to the rate of speed. Muth v. Railroad, 87 Mo. App. 434. (2) The court erred in giving each of the instructions for the plaintiff. The plaintiff having alleged specific acts of negligence, those acts alone should have been submitted to the jury, which they must find to have been the proximate cause of the injury. Each of the plaintiff's instructions which goes to the merits of the case directs the jury to find against the defendant upon any cause of negligence, whether alleged or not. The plaintiff having limited her right to recover to the specific acts of negligence alleged, to burden the issues submitted to the jury in the manner set out in plaintiff's first and second instructions was error. Feary v. Railway, 162 Mo. 94; Hite v. Railway, 130 Mo. 136.

*Seneca N. Taylor* and *Klein, Schmidt & Reppy* for respondent.

(1) It does not require an expert to testify as to the speed of a car. Anyone accustomed to riding upon cars and seeing them run may testify as to speed. Walsh v. Railroad, 102 Mo. 582; Covel v. Railroad, 82 Mo. App. 186; Railroad v. Steinberg, 17 Mich. 99; Louisville v. Jones, 108 Ind. 551; Pears v. Seattle, 6 Wash. 227; Pence v. Railroad, 42 Am. and Eng. Railroad Cases, 126; Robinson v. Railway, 112 Fed. 487. (2) A carrier of passengers is required, so far as it is capable by human care and foresight, to carry them safely, and it is responsible for all injuries resulting to its passengers from even the slightest negligence on its part. Higgins v. Railroad, 36 Mo. 428; Lemon v.

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Chanslor, 68 Mo. 356; Waller v. Railroad, 83 Mo. 615; Leslie v. Railroad, 88 Mo. 55; Furnish v. Railway, 102 Mo. 150; O'Connell v. Railroad, 106 Mo. 482; Clark v. Railroad, 127 Mo. 208; Hight v. Railway, 130 Mo. 139; Powers v. Railway, 60 Mo. App. 482; Parker v. Railway, 69 Mo. 54; Choquette v. Railway, 80 Mo. App. 520; White v. Railroad, 136 Mass. 324; Nagle v. Railroad, 88 Cal. (1891) 86; Railway v. Cook, 145 Ill. (1893) 551. (3) The breaking down or giving way of any portion of the means of transportation of a carrier of passengers for hire whereby an injury happens to a passenger, constitutes a prima facie presumption of negligence on the part of the carrier, which casts upon the carrier the burden of showing to the reasonable satisfaction of the jury that such breaking down or giving way took place notwithstanding the carrier had exercised to prevent the same the utmost care, skill and foresight of a very cautious person engaged in that employment, and notwithstanding that the carrier had not been guilty of even the slightest negligence tending to produce such breaking down, but that it was the result of mere casualty or unavoidable accident. Unless this presumption is rebutted by the carrier to the reasonable satisfaction of the jury, they may regard it as conclusive, but the carrier can rebut it by showing that the accident which produced the injury to the passenger could not have been prevented by the carrier, or its agents or servants by the exercise of the utmost care, skill and foresight of a very cautious person engaged in the same business. Dougherty v. Railroad, 81 Mo. 325; Hipsley v. Railroad, 88 Mo. 352; Clark v. Railway, 130 Mo. 51; Yerkes v. Keokuk Packet Co., 7 Mo. App. 267; Madden v. Railroad, 50 Mo. App. 675; Meyer v. Railroad, 64 Pa. St. 225; Taylor v. Railroad, 84 N. H. 304; Railroad v. Blumenthal, 160 Ill. 40; Railroad v. Jennings, 83 Ill. App. 612; McCaffery v. Railroad, 193 Pa. St. 339; Meador v. Railway, 61 Pac. (Kan.) 442; Railroad v.

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Findlay, 76 Ga. 311; Murphy v. Railroad, 89 Ga. 833; Railroad v. Snyder, 117 Ind. 435; Anderson v. Shaley, 114 Ind. 553; Railroad v. Anderson, 72 Md. 526; Gehnor v. Railroad, 101 Mass. 208; Railroad v. Kuhn, 86 Ky. 578; Railroad v. Jones, 83 Ala. 377; Gleason v. Railroad, 140 U. S. 435; Fetter on Carriers of Passengers, p. 1109, chap. 34, sec. 480; Story on Bailments, 601; 2 Shearman & Redfield on Neg. (5 Ed.), 516; Hutchinson on Carriers (1 Ed.), p. 617, sec. 800; Booth on Street Railways, sec. 361.

STATEMENT.

On Sunday afternoon, September 28, 1902, Mr. and Mrs. J. W. Aston, accompanied by their three children, started returning from Forest Park; at about five o'clock they boarded a car of defendant then stationary at Forest Park University; the car within was filled with passengers, and the family were compelled to remain on the rear platform. The father, having paid their fare, stood with the youngest child, an infant, in his arms, and the mother was opposite with her arm on the shoulder of the eldest child, a daughter then about seven years of age, standing near or against the gate on the north side of the platform; the car started eastward, stopped at Forest Park Highlands, where more passengers were taken up, and after proceeding a short distance, the gate swung open, the mother and child were precipitated from the car to the ground and injured. The testimony on behalf of plaintiff tended to show that the gate was not fastened but the cause of its becoming loose did not clearly appear; by the evidence of numerous witnesses, it further appeared that the roadbed of defendant, at the place of the casualty, was in bad condition and the car was then being propelled at a high rate of speed. The evidence in defense on the contrary demonstrated that the track was in good condition, well ballasted with a combination of cinders, dirt and macadam, constructed with sixty pound T rails, the

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usual rails for such purposes outside of streets, that the gate was one in common use and had been inspected by the conductor of the car before the trip was begun and was securely fastened, both the gate and the fastening in perfect condition, the fastenings were first class and could not be opened by mere jolting of the car but would have to be opened by some one, and the speed of the car, was moderate, not exceeding ten miles per hour.

The assignments of negligence, in the complaint on which the trial was had, were, that defendant permitted so many persons upon the rear platform as to negligently overcrowd it; that, after the platform was so overcrowded, the car was operated at a careless and negligent speed of about twenty-five miles per hour; that the track was in negligent, rough condition, not well ballasted and unfit to operate a car over at even twelve miles per hour; that the gate of the rear platform was not securely and safely fastened, but left in negligent condition, liable to swing open and allow plaintiff to be thrown from the platform; that the several acts of defendant thus enumerated together produced a severe jostling of the passengers upon the rear platform, causing them to crush against plaintiff next to the gate which gave way, swung open and the plaintiff was thrown from the car while it was moving at such negligent speed; the injuries sustained were then detailed and judgment asked. These allegations were put in issue by defendant's answer, the cause was tried in the circuit court of Jefferson county on change of venue before a jury, a verdict returned for plaintiff and defendant has appealed.

REYBURN, J. (after stating the facts as above). —1. The first point made by appellant, is that the trial court erred in admitting the opinions of witnesses,

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introduced by plaintiff as to the rate of speed attained by defendant's car. That the velocity of a car or a train in motion, propelled by electric or steam power does not require to be established by the testimony of experts, is now fixed beyond reasonable question. No technical knowledge is essential to form an opinion upon such subject, nor does it involve any scientific question to be answered only by a skilled witness, but it relates to a matter of common observation, and any intelligent person accustomed to notice moving objects, who had opportunity of seeing a car or train, would be enabled to form some opinion; the experience and capacity of the testifying witness and the consequent reliability and value of his testimony would affect the weight but not the competency and admissibility of the evidence. Walsh v. Railway, 102 Mo. 582; Corell v. Railway, 82 Mo. App. 181; Lehigh, etc., Co. v. Rainey, 112 Fed. Rep. 485; Detroit, etc., Co. v. Van Steinburg, 17 Mich. 99; Louisville, etc., Railway v. Jones, 108 Ind. 551. The witnesses, who testified to the rate of motion of this car, were accustomed to railroad travel, many rode daily on street cars, and some of them had travelled frequently on steam railroads also, and were undoubtedly qualified to express their judgments upon the rapidity at which this car was operated, leaving the jury to give such testimony the weight it merited. In the case of Muth v. Railway, 87 Mo. App. 422, invoked by appellant, the testimony criticised appears to have emanated from non-observant, inexperienced witnesses without any opportunities for forming opinions of the speed of the moving car in question.

2. The second assignment of error presented by appellant declares that the instructions for plaintiff, directed to the merits of the case exceed and broaden the issues, and warrant the jury to return a verdict against defendant upon any cause of negligence, whether pleaded or omitted by plaintiff. The rule is

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recognized, and approved, so well settled and so frequently repeated, that a plaintiff cannot allege one cause of action and recover upon proof of another not stated; and that when a plaintiff alleges specific acts of negligence on defendant's part, the evidence and likewise the right of recovery will be confined to the specific acts charged. Chitty v. Railway, 148 Mo. 64; Hite v. Railway, 130 Mo. 132; Feary v. Railway, 162 Mo. 75.

It is impossible, however, to find any just ground for charge of infraction of above principle in the instructions criticised; the first instruction in express terms directed the jury in passing upon the question whether the defendant was, or was not negligent, in operating its cars on the occasion in question, to take into consideration all the facts and circumstances as shown by the evidence to have existed at the time when, and the place where, the injury in question occurred, and to give to each fact and circumstance and the testimony of each witness, such weight only, as it deemed such fact, circumstance or testimony entitled to, in connection with all the evidence in the case. If further limitation was essential this instruction was qualified by the succeeding instructions, particularly those numbered two, four and five of appellant. The second particularly declared there was no issue that the gate was not properly made nor of a safe kind or the fastenings not of a safe kind; but the actual issue was that the gate was not securely fastened, but was left in a negligent condition liable to swing open and allow plaintiff to be thrown from the platform. In fact the infirmity of widening the issues beyond the range of the pleadings if yielded to by the court, was invited by appellant in its fourth instruction which infused, for the consideration and finding of the jury, the additional issues, whether the gate was safe and of the latest and most approved pattern manufactured for the use and construction of street cars, and the fastenings of the safest kind known to street railroad service; no evidence appeared touching the pattern of the gate or demonstrating that the fastenings were the latest and safest kind or otherwise. The same instruction is amenable to

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further like charge in submitting the question, whether the gate, without knowledge or consent of defendant or its employees, was unfastened by some passenger or other person, in which contingencies, the jury was instructed, defendant was not liable; the record is destitute of any testimony tending to prove that any stranger or in fact any person opened the gate.

3. Nor are the reflections upon the remaining instructions of plaintiff well founded, or sustained. No allegation was made in the statement of the cause of action, nor was any proof tendered by plaintiff of the gate breaking, and in such confined sense it may be claimed, as pressed by appellant, that it did not give away, but such language in a broader construction of those terms was appropriately used in the instruction descriptive of the occurrence, not necessarily involving the element or existence of fracture or forcible separation in itself, but of partial yielding and disconnection from its position as a barrier and safeguard on one side of the platform, and in which meaning the words were employed, adopted and applied throughout without any probability or even possibility of confusing or misunderstanding by the jury. The degree of care imposed on defendant was defined with accuracy and precision by the instructions in accordance with the rulings frequently announced in this state. High v. Railway, 130 Mo. 132; Clark v. Railroad, 127 Mo. 197; O'Connell v. Railroad, 106 Mo. 482; Chouquette v. Railway, 80 Mo. App. 515; Jackson v. Railway, 118 Mo. 199; Olsen v. Railway, 152 Mo. 426; Sullivan v. Railway, 133 Mo. 1.

The instructions also properly and in appropriate language submitted to the jury the presumption of negligence imputable from the occurrence itself; the passenger by showing the happening of the accident made out a prima facie case, and the burden shifted to the defendant to exculpate and absolve itself from presumptive and inferred negligence, and it was for the jury to say, in the light of all the testimony, whether defendant had in its defense disclosed facts exonerating it from responsibility. Chouquette v. Railway and Clark

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v. Railroad, supra; Furnish v. Railway, 102 Mo. 438; Hipsley v. Railway, 88 Mo. 348.

4. The respondent insists that the appeal is so plainly devoid of merit and manifestly vexatious, as to demand and justify an award of damages under the plainly devoid of merit an award of damages under the statute. R. S. 1899, sec. 867. We cannot assent to this view nor are we willing to declare from full review of the record that the appeal was not taken in good faith, or that this case properly belongs to the class contemplated by above statutory provision.

The judgment is affirmed. *Bland, P. J.*, and *Goode, J.*, concur.

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MARSHALL, Appellant, v. ARMSTRONG, Respondent.

St. Louis Court of Appeals, February 2, 1904.

1. **VERDICT: Majority Verdict.** Under the amendment to the Constitution, adopted in 1900, a majority verdict may be rendered, but it must be concurred in by at least three-fourths of the jury; a less number can not render a legal verdict.

2. **———: Counterclaim: Separate Findings.** On the trial of a cause where the defendant filed a counterclaim, a verdict which failed to have separate findings on plaintiff's cause of action and on defendant's counterclaim was incomplete.

Appeal from Scott Circuit Court.—*Hon. H. C. Riley*, Judge.

REVERSED AND REMANDED.

*Marshall Arnold, J. F. Green* and *Martin L. Clardy* for appellant.

(1) Upon the face of the record the judgment is erroneous, as it is shown to have been rendered on a finding and verdict of seven jurors. Bank v. Anderson, 1 Mo. 244; State v. Mansfield, 41 Mo. 470; Vaughn v. Skade, 30 Mo. 603; Tapley v. Matson, 38 Mo. 489. (2) The case was tried upon issues not raised by the pleadings. Defendant's answer pleaded a counterclaim in his favor for five hundred dollars ($500.00) against the firm of Marshall & Brother.

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This was not a mutual indebtedness between the parties and was not the subject of set-off or counter-claim. R. S. 1899, sec. 4487; Payne v. O'Shea, 84 Mo. 129. (3) There is no finding by the jury on the issues made in the pleadings. Henderson v. Davis, 74 Mo. App. 1; Pope v. Ramsey, 78 Mo. App. 157; Hitchcock v. Baugher, 44 Mo. 42; Cordage Co. v. Yeargan, 87 Mo. App. 565. (4) It is respectfully submitted that, upon the whole record, it is apparent that this case was tried upon issues not raised by the pleadings and that there is no substantial evidence to support the finding of the jury. Fairchild v. Creswell, 109 Mo. 29; Hunt v. Railroad, 89 Mo. 607. And, for the reasons heretofore stated, the judgment should be reversed.

*Frank Kelly* for respondent.

(1) The clerk has set out the verdict, and followed it with the names of seven of the jurors, but for aught the record shows it is the verdict of the twelve. All twelve men may have agreed to the verdict when it was returned, although previously signed by seven of them; it may have been agreed to accept the verdict of a majority, and the record fails to show the agreement; it may have been intended to be a verdict of three-fourths of the jury and two jurors failed to sign it. The act of following the verdict with the names of seven of the jurymen in the body of the judgment, was the act of the clerk and not that of the court, and matters not part of the record can not be made such by recital of the clerk. Nicholas v. Stevens, 123 Mo. 119. (2) In the absence of evidence in the record to the contrary, it will be presumed that the acts and rulings of the trial court were correct. Borth v. Gilbert, 85 Mo. 125. The trial court will not be put in the wrong unless the record affirmatively shows error on its part. Mumsford v. Keet, 71 Mo. App. 537. The silence of the record in regard to the verdict affords the presumption that the plaintiff

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agreed to it. Sullivan v. Knights of Father Mathew, 73 Mo. App. 46. (3) If there were error in the formality of signing the verdict, objection would have to be taken by motion in arrest, or it will be waived. Catell v. Dispatch Pub. Co., 15 Mo. App. 587; Stone v. Taylor, 72 Mo. App. 486; Rothschild v. Lynch, 76 Mo. App. 346; Clark v. Porter, 90 Mo. App. 153; Henderson v. Davis, 74 Mo. App. 5; Briggs v. Railway, 111 Mo. 175; Bank v. Howell, 79 Mo. App. 320. Mere formal defects, patent of record, not sufficient to reverse judgment unless advantage thereof is taken by motion. Singer Mfg. Co. v. Stevens et al., 169 Mo. 1; Duncan v. Oliphant, 59 Mo. App. 1; Provo Mfg. Co. v. Severance, 51 Mo. App. 260; Hopper v. Hopper, 84 Mo. App. 117. (4) If the court were to believe three-fourths of the jury undertook to return the verdict, but it is not known whether they did or not, and two jurors failed to sign it, it is a mere formal omission that will not render the verdict void. Statutes requiring verdicts to be signed are regarded as directory. 22 Encyclopedia of Pleading and Practice, 897, sub. 4. "Written verdicts and following titles;" Gurley et al. v. O'Dwyer, 61 Mo. App. 348. Possibly objection is found to the general verdict of the jury on the counterclaim, but this kind of verdict is good. Erdbrueger v. Mier, 14 Mo. App. 258; Taylor v. Short, 38 Mo. App. 21; Hackworth v. Zeitinger, 48 Mo. App. 32; Bacon v. Perry, 25 Mo. App. 73. (5) In civil cases appellate courts examine only points assigned as error. Powell v. Moeller, 107 Mo. 471; Long v. Long, 96 Mo. 180.

STATEMENT.

Appellant brought this action against defendant to recover balance claimed on a lengthy account, of which an itemized statement accompanied the petition as an exhibit thereto. Defendant's answer was a general denial, united with an affirmative plea that plain-

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tiff was indebted to defendant for building a schoolhouse in sum of $500, for which judgment was asked.

Evidence was introduced tending to show that plaintiff was conducting a lumber business individually, and had sold the account of lumber detailed to defendant, and the balance of $439.37 was due him; that he was also engaged under the name of Marshall & Brother in general store, but this account had no connection with such firm business. Defendant in turn testified that there were 36,000 shingles, worth from $2 to $2.25 per thousand, charged in the account, in excess of the number actually delivered, but the account in other regards was not disputed; he stated further that he built the schoolhouse for $464, under contract with the school board, and gave Sterling Marshall the warrant for that amount received, and was entitled to a credit therefor. Additional testimony of a cumulative or corroborative nature, unnecessary to recite, was also offered.

The court submitted the case to the jury upon two instructions, as follows:

"The court instructs you that, if the account sued on is proved, but payment thereof is claimed by defendant, the burden of proving such payment rests on defendant.

"The burden of proof to make out his case by a preponderance or greater weight of evidence rests upon the plaintiff, and unless you believe he has done so, your finding should be for the defendant."

The jury returned a verdict signed by seven of their number, in the form thus:

"We the jury, find the issues for the defendant, and assess his damages at eighty-eight and 75-100 dollars."

The court rendered judgment against plaintiff and in favor of defendant for the latter sum, and after unsuccessful motion for new trial, plaintiff has appealed.

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REYBURN, J., (after stating the facts as above).

1. The plaintiff was entitled to a verdict, under the amendment to the constitution, concurred in by at least three-fourths of the members of the jury, and the verdict as rendered by seven jurors, was fatally defective and in legal effect no verdict at all. Girdner v. Bryan, 94 Mo. App. 27.

2. The form of the verdict was incomplete in containing no finding upon all the issues submitted to the jury; there should have been separate findings upon plaintiff's cause of action and defendant's counterclaim respectively. Henderson v. Davis, 74 Mo. App. 1; Hitchcock v. Baughan, 44 Mo. App. 42.

3. As the case must be remanded to the lower court for retrial, it may be proper to suggest that if the counterclaim sought to be interposed by defendant, if it be proper matter of counterclaim or offset to plaintiff's demand, which we do not deem necessary to decide in the condition in which the case is before this court, be still relied on, the answer setting it up should be amended in conformity to the facts out of which it is alleged to have arisen.

Judgment reversed and cause remanded. *Bland, P. J.*, and *Goode, J.*, concur.

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## MORGAN, Respondent, v. GARRETSON & GREASON LUMBER COMPANY, Appellant.

**St. Louis Court of Appeals, March 1, 1904.**

1. **JUSTICES OF THE PEACE: Notice of Appeal: Appearance.** Where two cases, appealed from a justice of the peace, were, by agreement of the parties, tried as one suit, that agreement, whether oral or in writing, was an appearance by the appellee to both suits and a waiver of notice of appeal.

2. **EVIDENCE: Contract Collateral to the Main Issue.** In an action for the value of some timber, sold and delivered by plaintiff to defendant, where, under the defense urged, the main issue was whether or not the timber was cut from the land of a stranger who had seized it, a written contract between plaintiff and another stranger giving plaintiff a license to cut timber on the latter's land, was collateral to the main issue and its production in evidence was not necessary.

Appeal from Stoddard Circuit Court.—*Hon. J. L. Fort*, Judge.

AFFIRMED.

*J. R. Young* for appellant.

(1) Case number 193 was not triable because there was no notice of appeal and because the appellee had not entered his appearance. R. S. 1899, sec. 4074 and sec. 4075; Hawley v. Railroad, 80 Mo. 540. (2) A party can not split his demand without consent of the debtor. Morrison v. deDonato, 79 Mo. App. 643. (3) Timber growing and standing on land is a part of the real estate and must be disposed of by instrument effectual to convey an interest in real estate, and if respondent did not have title to the timber standing upon the land he could not create title by cutting it down and hauling it away. Anderson v. Costigan,

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30 Mo. App. 32; Deland v. Vanstone, 26 Mo. App. 301; Alt v. Grosclose, 61 Mo. App. 412. (4) Where timber is severed from land without right the title to the timber remains in the owner of the land. Baker v. Campbell, 32 Mo. App. 533; Kelley v. Vandiver, 75 Mo. App. 437.

BLAND, P. J.—It is asserted by appellant in his statement of facts, that respondent had one demand against it; that he split that demand and brought two suits thereon before a justice of the peace, both of which were appealed to the circuit court, where they were docketed as numbers 187 and 193; that no notice of the appeal in case No. 193 had been served on the appellee nor had he entered his appearance to said suit in the circuit court. But that notwithstanding no notice of appeal had been given on the day No. 187 was called for trial, on the suggestion of respondent the two suits, over the objection of the appellant, were by the court consolidated and made one suit. The issues were, by agreement of counsel, submitted to the court without a jury, who, after hearing the evidence, found for the plaintiff and assessed his damages at $80, for which amount judgment was rendered. Timely motions for new trial and in arrest were filed, which were by the court overruled. Defendant appealed.

The accounts sued on in the justice's court are nowhere to be found in the record, nor are they set out in the abstracts; but it is shown by the record proper that there were two causes pending in the circuit court which, by agreement of parties, were tried as one suit. This agreement, whether oral or in writing, was an appearance by defendant to both suits and was a waiver of notice of appeal, if one was required. Bates & Wright v. Scott Bros., 26 Mo. App. 428; Pattison v. Railway, 93 Mo. App. 643; Crenshaw v. Ins. Co., 71 Mo. App. 42.

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The suit, as we gather from the evidence, seems to have been to recover the value of some piling timbers respondent had cut and delivered, or attempted to deliver, to the appellant. That he cut the timber and hauled it to the appellant's yards and there unloaded it, is not denied, and that it was shipped by appellant is reasonably inferable from the testimony. It is claimed by appellant that respondent cut the timber from the lands of the Chouteau Land & Lumber Company and that the timber was seized and taken possession of by that company and that it was shipped as the timber of that company. Respondent testified that the timber was not cut from the lands of the Chouteau Land & Lumber Company, but from the land of Reed and Young, and that he had permission from E. A. Thomas to cut the timber. Thomas testified that he and Fittenger had a written contract with Reed and Young, authorizing them to work the timber on their land and that he (Thomas) had sold the right to respondent and that the contract was in writing and was at his home. The appellant moved to strike out so much of the evidence of Thomas as tended to show a right in him and Fittenger to cut and remove timber from the lands of Reed and Young, for the reason the witness testified that the grant of license was evidenced by a written contract in his possession. The court refused to strike out this testimony, to which refusal appellant duly saved an exception.

The main issue and the one upon which the case hinged was whether or not the timber in question was cut from the lands of the Chouteau Land and Lumber Company. The written contract from Reed and Young to Fittenger and Thomas, permitting them to cut timber on their land was collateral to the main issue and its production as evidence was not necessary. 1 Greenleaf on Evidence (15 Ed.), sec. 89. In fact the offer of evidence of the existence or non-existence of that



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contract was an attempt to introduce a false issue in the controversy and to divert the mind of the trier of the facts from the true issue, to-wit, whether or not the timber was cut from the lands of the Chouteau Land & Lumber Company. The *onus probandi* to show title to the timber in the Chouteau Land & Lumber Company was on the defendant. Its failure to do so by evidence satisfactory to the court entitled plaintiff to a verdict and he was not called on to show a right to cut the timber from the land of Reed and Young.

The judgment is affirmed. *Reyburn* and *Goode*, *JJ.*, concur.

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## VAN STEWART to use of MAGRUDER, Respondent, v. MILES et al., Appellants.

St. Louis Court of Appeals, March 1, 1904.

1. **PRACTICE: Parties: Real Party in Interest.** The assignee of a judgment, under code practice, should sue in his own name, as the real party in interest, in an action on the appeal bond, and not in the name of his assignor to his use.

2. ———: **Pleading: Defect of Parties: Waiver.** A defect of parties apparent on the face of the petition must be raised by demurrer. The objection that the suit is brought in the name of one not the real party in interest is waived by answer to the merits and going to trial.

3. **UNLAWFUL DETAINER: Title and Right of Possession not in Issue.** In an action for forcible entry and detainer, neither the title nor right of possession is in issue, the only question being whether there has been a forcible entry on the plaintiff's possession.

4. **RES ADJUDICATA.** In an action on an appeal bond given in a forcible entry and detainer suit, that part of the answer which set up in defense facts which might have been invoked as matters of defense to the forcible entry and detainer action, was properly stricken out on motion because already adjudicated.

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Appeal from Pike Circuit Court.—*Hon. D. H. Eby*, Judge.

AFFIRMED.

*Martin & Woolfolk* and *Pearson & Pearson* for appellants.

(1) The motion in arrest among other things challenges the right of Van Stewart to sue to the use of Magruder, when the petition shows the cause of action to have been assigned to Magruder. Lionberger v. Baker, 14 Mo. App. 353; Bank v. Bulkly, 68 Mo. App. 377; Guerney v. Moore, 131 Mo. 651. Magruder having the legal title to the judgment as assignee and he being authorized by statute (sec. 3748) to sue in his own name and there being no person expressly authorized by statute to sue (sec. 541) and the statute (sec. 540) requiring all actions to be brought in the name of the real party in interest and in the name of the person who has the apparent legal title (131 Mo. 668), the conclusion would seem logically to follow that this suit should have been brought in the name of Magruder. Bliss on Code Pleading, sec. 45; Black on Judgments, secs. 951, 952; Gay v. Orcutt, 169 Mo. 400; Benne v. Schnecko, 100 Mo. 250; State ex rel. v. Dobson, 63 Mo. 451; Bartlett v. Eddy, 49 Mo. App. 32; Furniture Co. v. Roddatz, 28 Mo. App. 210; Burns v. Bangert, 16 Mo. App. 22; Price v. Clevenger, 74 S. W. 874; Ullman v. Kline, 87 Ill. 268. This defect appears upon the face of the petition and can be reached by motion in arrest. Hutchins v. Weems, 35 Mo. 285; Needles v. Ford, 167 Mo. 495; Hart v. Harrison Wire Co., 91 Mo. 414. (2) The matter set up in the answer constitutes a good defense to the recovery of rents and profits. In an action of forcible entry the right to possession or title does not enter. The inquiry is limited

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to the immediate possession of plaintiff and the forcible entry by defendant. Stone v. Malot, 7 Mo. 158; Krevet v. Meyer, 24 Mo. 107; Spalding v. Mayhall, 27 Mo. 377; Beeler v. Cardwell, 29 Mo. 72; Prewitt v. Burnett, 46 Mo. 372; Craig v. Donnelly, 29 Mo. App. 342; Greenlief v. Weakley, 39 Mo. App. 191; Merriwether v. Howe, 48 Mo. App. 148; Sitton v. Sapp, 62 Mo. App. 197; Tolbert v. Hendricks, 77 Mo. App. 272.

*J. D. Hostetter* and *Norton, Avery & Young* for respondent.

(1) The first proposition advanced by the appellants' counsel, i. e., the right of Van Stewart to maintain this cause of action to the use of George W. Magruder, the assignee, must, under the authority of a prior decision of this court in a case exactly similar, be ruled against them. Robert A. May to the use of Lackland et al. v. John A. Kellar, 1 Mo. App. 381. (2) If the facts stated in that part of appellants' answer are true and existed as appellant pleads they did exist at the time and before the trial, then, under the Kelly v. Clancy case, 15 Mo. App. 519, and the Oaks case, 46 Mo. App. 11, it was a proper matter for defense in that case at that time. Stewart v. Miles, 166 Mo. 174. (3) Estoppels by judgment are the very highest forms of estoppel; they can not be gainsaid or denied. Bunne v. Appleman, 83 Mo. App. 79; Johnson v. Real Estate Co., 167 Mo. 325.

REYBURN, J.—This action was begun in the circuit court of Lincoln county upon an appeal bond bearing date December 28, 1898, executed to Van Stewart as obligee, who sued to use of George W. Magruder, against the principal obligor and his sureties. The petition contained allegations of the recovery by Stewart of judgment in the circuit court against Miles for possession of realty described in a suit for forcible entry

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and detainer, together with twenty dollars damages and ten dollars monthly rents and profits, an appeal to this court, the execution of the bond and its conditions, an affirmance of the judgment appealed from and assignment for value to Magruder of the judgment, assigning as breach its non-payment, aggregating a total exceeding four hundred dollars, the penalty of the bond for which judgment was asked. A change of venue was granted on defendant's application to the circuit court of Pike county, and defendants filed a joint answer, concluding with a general denial, but first admitting rendition of the judgment, appeal therefrom, execution of the bond and liability of the defendants thereon for amount of the judgment rendered by the circuit court of Lincoln county, to-wit, twenty dollars and costs of suit, and denying any liability on the bond for rents and profits or other damages, and averring that plaintiff Stewart was put in possession of the land, for which he brought his action of forcible entry and detainer against Miles, by plaintiff Magruder, and was a tenant of Magruder at time of the forcible entry by Miles. That before Stewart was thus put in possession Magruder had executed a deed of trust for its purchase money and while Stewart was so in possession and before trial of the suit of Stewart against Miles, the deed of trust was foreclosed and all the land sold and defendant Dewey, (a surety), became purchaser and entitled to the rents, profits and possession of such land, as against Stewart and Magruder; and defendant Miles in such suit was tenant of and put in possession of such land by Dewey, and Stewart's term as tenant of Magruder had expired before trial of the case of Stewart against Miles in the circuit court of Lincoln county. That in consequence of the fact that all right, title and interest of Magruder and his tenant in these lands had been sold and purchased by Dewey, before the trial and the further fact that Stewart's term had expired at the time, neither Stewart nor Magruder were longer en-

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titled to the possession of the lands and had no interest in the rents and profits after the trial of the cause in the circuit court of Lincoln county. On proper motion, the court struck out all the answer, except the admissions and the general denial, as constituting no defense, and from judgment for penalty of the bond, defendants by appeal have brought the case to this court.

1. The first objection to the judgment below encountered is a challenge of the right of Magruder, as assignee of the judgment, to maintain the action in the form adopted, or legal power of Stewart, assignor, to prosecute the action to the use of Magruder, his assignee. The case of May to use, etc. v. Kellar, 1 Mo. App. 381, is invoked as authority for maintaining this action in the shape, in which it was brought, and while the distinction sought to be made by appellant depreciating its application and cogency, that in the above case the judgment was assigned before the appeal bond was executed, does not lessen the consideration to which it is entitled, yet while the form of the action therein is approved in the motion for rehearing as properly brought in the name of the obligees of the appeal bond to use of the assignees, it should be observed, as appellants argue, that this point does not appear to have been made or contested. In modern procedure and under code practice, the assignee of a judgment should sue in his own name upon the appeal bond as the true party in interest, especially where the bond was executed prior to the assignment, as the assignment carries with it all demands arising on this undertaking. Apart from express statutory exceptions, of which this case is not one, it would appear inconsistent with the provisions of the code to permit one person to sue to the use of another as was formerly occasionally allowed, but the party beneficially interested should bring the action in his own name. R. S. 1899, secs. 540, 541 and 542; Pomeroy's Code Remedies (3 Ed.), secs. 134 and 138. But this defect or misjoinder of parties plaintiff was

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apparent on the face of the petition, and not having been taken advantage of by demurrer, was waived by the defendants filing their answer. R. S. 1899, sec. 598; Meriwether v. Joy, 85 Mo. App. 634; Jones v. Railway, 89 Mo. App. 653.

The case of Hutchings to the use of Blackford v. Weems, 35 Mo. 285, lends some countenance to the appellant's contention that the defect of parties plaintiff could be raised by motion in arrest. It is to be observed, however, that that case originated before a justice of the peace, where the defendant could not demur. The doctrine universally followed is, that where a defect of parties plaintiff appears on the face of the petition, it must be taken advantage of by demurrer. If the above case be a precedent in appellant's favor, we must disregard it as authority, because there are later decisions of the Supreme Court directly opposed to it, and if it holds a defect of parties apparent on the face of the petition is not waived by answer and going to trial, it is out of the universal line of the law on the subject in this State and elsewhere. Reugger v. Linderberger, 53 Mo. 364; Butler v. Lawson, 72 Mo. l. c. 247; Pike v. Martindale, 91 Mo. 268; R. S. 1899, sec. 598.

In State to use of Saline county v. Sappington, 68 Mo. l. c. 457, it was held that, granting Saline county had no interest in the subject-matter of the action (which was on the bond of the county treasurer for the safekeeping of the school funds) the defect of parties was waived by defendants answering and the same question could not be raised anew in their answer.

In State to use of Wolff v. Berning, 74 Mo. l. c. 99, the same ruling was made, though it appeared that the relator was not the only party interested in the subject-matter of the action, which was upon bond of defendant as executor, and the point of the objection was that relator was not solely interested in the estate but there were other parties interested.

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Even more directly in point, if possible, is Loan & Trust Co. v. Brown, 59 Mo. App. 461, in which the defendant demurred on the ground that the suit appeared on the face of the petition not to be in the name of the real party in interest, which demurrer was overruled and the defendant proceeded to trial, and subsequently assigned as error the ruling on the demurrer. In disposing of that assignment, the court said the evidence showed in fact that a man by the name of Allen was the sole beneficiary of the action and that if the plaintiff recovered anything, the fruits of the recovery would go to him; but as the defendant answered to the merits and went to trial, he could not afterwards raise the objection that the real party in interest had not been made a party plaintiff. The justice of this doctrine is the more apparent when we remember that if there had been a demurrer in the present case, the court could have stricken out Van Stewart's name and permitted the cause to proceed in the name of Magruder.

2. Nor was the ruling of the trial court erroneous in striking out, as comprehending no defense, to the action on the bond, those portions of defendant's answer above reproduced. In actions of this character neither the title nor the right of possession is in issue. In the apt language of an early case in Sitton v. Sapp, 62 Mo. App. 203, "There is no rule of law more fully and definitely settled than that, in an action of forcible entry and detainer, neither the title nor the right of the possession is in issue. The matter of right is foreign to the case. The question is merely, has there been a forcible entry on the plaintiff's possession. If there has been, the intruder must restore the possession; place the party *in statu quo* and then if he has a case, he can assert it by legal proceedings. The law does not permit him to redress his grievance with his own hand, and if he does so redress it, the law will undo the work and place the parties as they were before the entry." The allegations stricken out sought, in effect, to collaterally

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impeach the judgment rendered in the forcible entry and detainer case, and relitigate the issues theretofore tried therein and passed upon by the circuit court of Lincoln county, and from the judgment in which the appeal was taken to this court. If the allegations composing the parts stricken out were founded on facts, they existed, as therein pleaded, at the time of the trial, and should have been invoked as matters of defense, if relied on, if indeed they were not in fact expressly presented as matters of defense and adjudication. Stewart v. Miles, 166 Mo. 174; s. c., 80 Mo. App. 24. As expressly held in Johnson v. Realty Co., 167 Mo. 325, "A judgment obtained in a court having jurisdiction of the parties and the subject-matter in controversy, is conclusive between the parties thereto and their privies, and can not be gone behind for the purpose of showing a state of facts which might have been a defense to the action in which the judgment was rendered." The judgment is accordingly affirmed. *Bland, P. J.*, and *Goode, J.*, concur.

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## ROBORDS, Appellant, v. BRYAN, Respondent.

St. Louis Court of Appeals, March 1, 1904.

**GUARDIAN AND WARD: Misconduct of Guardian.** Where the guardian of a minor, in managing the trust estate, performs his services with a view to his own interest rather than the interest of his ward, after being reimbursed for expenses incurred, is not entitled to any compensation for his services, although his acts have resulted in benefit to the estate.

Appeal from Greene Circuit Court.—*Hon. Jas. T. Neville,* Judge.

AFFIRMED.

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*Patterson & Patterson* for appellant.

(1) The statutes of the State of Missouri provide as follows: "SECTION 3534. Compensation—Guardians and Curators shall receive such compensation for their services as the court shall decide to be just and reasonable, etc." Revised Statutes 1899, p. 879. (2) Unfaithful administration will not deprive an executor of a right to compensation, for services so far as they have been beneficial to the persons interested in the testator's estate. Jennison et al. v. Hapgood, 27 Mass. (10 Pickering) 111. (3) Reasonable commission should never be refused administrators or executors, unless willful default or gross negligence is shown, resulting in loss to the estate. Bendall's Distributees v. Bendall's Adm'r, 60 Am. Dec. 469. (4) It is held in numerous cases that compensation must be refused if the administrator has been guilty of willful default or gross negligence in the management of the estate, whereby the same suffered loss. 2 Woerner on Administration (1 Ed.), sec. 526, p. 1163. (5) It is only when an executor has been guilty of willful default, misconduct, or gross negligence in the management of the trust estate, whereby it has suffered loss, that compensation to which he would otherwise be entitled must be denied to him. The executor in this case has not been guilty of such default, misconduct, or negligence and it was properly allowed compensation for its services. St. Paul Trust Co. v. Kittson, 65 N. W. 77.

*Barbour & McDavid* for respondent.

Commissions are intended to and belong to a faithful administration of the estate, and should not be allowed in a case where the evidence shows the curator has been guilty of bad faith towards the estate of his ward. State ex rel. Wolf v. Berning, 74 Mo. 100;

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State ex rel. Piles v. Richardson, 29 Mo. App. 595; Woerner's Am. Law of Admin., star page 1164; Woerner on Guardianship, secs. 106 and 154; McKnight v. Walsh, 23 N. J. Eq. 136; In Re Nowak, 78 N. Y. S. 288, 38 Misc. 713; Heard v. Daniel, 26 Miss. 451; Reed v. Ryburn, 23 Ark. 47; Scheib v. Thompson, 65 Pac. 499; State ex rel. Collin v. Gilmore, 50 Mo. App. 353; In re Wordell, 12 Atlantic 133; In re Kopps Est., 2 N. Y. Supp. 495; In re Schurrs Est., 13 Phila. 353, 37 Leg. Int. 194; Appeal of Fish, 7 Atlantic 222; Trimble v. Dodd, 2 Tenn. Ch. 500.

BLAND, P. J.—In 1894, the plaintiff qualified in the probate court of Greene county, Missouri, as guardian of Charles Love, minor, and the son of a deceased soldier. The ward was without visible assets. He had a right, however, under the laws of the United States, as a descendant of a deceased soldier, to make an original homestead entry, not exceeding one hundred and sixty acres, of the public lands anywhere in the territory of the United States. Plaintiff had been in the homestead entry business for a number of years and had acquired extensive information in respect to lands subject to such entries in the northwestern states. In November, 1894, he went to St. Cloud, Minnesota, and made homestead entry No. 17157 in the name of his ward and also made a cash entry in the name of his ward of fourteen and fourteen-hundredths acres adjoining the homestead lands, paying out of his own means the cost and expenses of the two entries. Before going to St. Cloud he had corresponded with one L. M. Linnell of Minnesota in respect to making the homestead entry for the benefit of his ward and had agreed by letter with Linnell that if he would make the improvements required under the homestead law on the lands and make final proof, that he (plaintiff) would sell and convey the lands to Linnell for five dollars an acre when the patent was obtained. It seems that

other parties got wind of the unlawful agreement between Linnell and plaintiff and contested the homestead entry. Plaintiff defended these contests and was successful in his defense. In order to perfect the homestead entry it became necessary to have a curator of the minor appointed in Minnesota. One was appointed and it is shown that an expenditure of $2240.14 was allowed against the estate in Minnesota for services rendered in and about perfecting the homestead entry and in making a sale of the lands. In 1890 a new guardian was appointed by the probate court of Greene county. After the perfection of the homestead entry and the patent was obtained therefor, the lands of the ward were sold for six thousand dollars and the balance, after deducting the expenses of the guardianship in Minnesota, was paid over to the defendant, the present guardian.

On April 14, 1900, plaintiff filed his claim, in the probate court of Greene county, against the estate of the minor as follows: "For expenses, $167.67. For compensation, $100." In February, 1900, he filed another claim in the same court as follows: "For expenses, $280.07. For compensation, $150." On the first claim the court allowed the expense account of $167.67, but disallowed the claim for compensation. No appeal was taken from this action of the probate court and the $167.67 allowed was paid plaintiff by the defendant. The demand now under consideration is for fifteen hundred dollars as compensation for plaintiff's services as guardian. Plaintiff was allowed $425 on this demand by the probate court, and defendant appealed to the Greene circuit court where on a trial *de novo* the issues were submitted to the court who, after hearing the evidence, made the following finding: "The court finds from the evidence that plaintiff was acting more with a view to his own interest in the matter than the interest of the estate, and further finds that he has heretofore been reimbursed for all outlays

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by him,'' and rendered judgment for the defendant from which plaintiff appealed. The finding of the court, that plaintiff had been reimbursed for all outlays made by him, is supported by the evidence. He rendered no services after he was allowed $167.67 by the probate court. His acquiescence in the judgment of that court is conclusive, and he is estopped thereby to demand any further compensation for expenses.

The claim here presented, however, is not for expenses but for compensation and the record shows that plaintiff has never received any compensation for his services as guardian. He is entitled to something unless his conduct was such as to deprive him of the right to claim compensation. The learned trial judge was clearly of the opinion that the defendant, in respect to the homestead entry made in the state of Minnesota, was acting more with a view to helping himself than for the benefit of his ward. The correspondence between the plaintiff and Linnell and the deposition of Linnell leaves no room to doubt that the learned circuit judge came to a correct conclusion; in fact this correspondence shows that plaintiff was acting with an eye almost solely to his own interest, and that the right of the ward to make a homestead entry was a right that he seized upon for the purpose of putting money in his own pocket, and we think it is also fairly inferable that the unusual outlay of money in order to protect the interest of the ward in the homestead entry in Minnesota was made necessary by the illegal agreements made between plaintiff and Linnell in respect to the lands. To allow plaintiff compensation in such circumstances would be to compensate him for his effort to make a profit for himself out of the estate of his ward.

The judgment is for the right party and is affirmed. *Reyburn* and *Goode, JJ., concur.*

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# COLEMAN et al., Respondents, v. HIMMELBERGER-HARRISON LAND AND LUMBER COMPANY, Appellant.

St. Louis Court of Appeals, March 1, 1904.

1. PLEADING: Changing Cause of Action. In an action for damages for the death of plaintiff's son, caused by the alleged negligence of the defendant, an amended petition based upon the same death, which attributed such death to facts, as constituting the defendant's negligence, different from the facts alleged in the first petition, did not change the cause of action.

2. MASTER AND SERVANT: Minors: Dangerous Employment. Where plaintiff's evidence showed that he hired his son, a minor, to work for the defendant, and expressly forbade his being employed in a branch of the service which was hazardous, the defendant was liable for the death of the boy while engaged in that employment unless it could be shown that his death was the result of his own willful act; negligence on his part would not excuse the willful misconduct of the defendant in placing him in a place of danger against the express directions of his father.

3. ———:———: Emancipation. It was error to exclude testimony on the part of the defendant, tending to show that the father had emancipated the boy prior to the time he was hired to the defendant.

4. RAILROAD COMPANIES: Switch Frogs. A lumber company which had a license from a railroad company to operate log trains over a branch of the latter's road, and maintained a section boss and gang of section men to keep that part of the road in repair, is amenable to the provisions of sections 1123 and 1125, Revised Statutes of 1899, and subject to the penalty therein, for failure to block switches, frogs, etc.

5. ———: ———: Instruction. In an action for damages on account of the death of plaintiff's son, alleged to have been caused by the son's having caught his foot in an unblocked frog, it was error to give an instruction to the jury based upon such facts and ignoring the question as to whether such frog was within the territory where the statute required the defendant company operating the road to block frogs, where the evidence is not clear as to the location of the frog.

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6. ——: ——: **Master and Servant: Limit of Liability.** Where the facts showed that the frog, where the son's foot was caught, if that was the cause of his death, was not on the side of the track where he was required to work in the pursuance of his duty, the defendant was not liable for the injury resulting unless intervening negligence was shown on the part of defendant that directly contributed to the injury.

7. **MINORS: Degree of Care Required.** A minor is bound to use that care which persons of his age, capacity and intelligence are capable of using in like circumstances, and a youth of eighteen years of age, of ordinary intelligence and experience, should show some incapacity besides his minority to warrant the court in instructing the jury that he was not required to use the same care as an adult.

8. **DAMAGES: Measure of.** In an action for damages, under sections 2865 and 2866, by parents for the death of their son, caused by the defendant's negligence, it was error to instruct the jury that they could assess such damages as, in their judgment, would compensate the plaintiffs for the loss of their son, without giving more definite instructions as to the measure of such damages.

Appeal from New Madrid Circuit Court.—*Hon. H. C. Riley,* Judge.

REVERSED AND REMANDED.

*L. W. Fisher, R. B. Oliver* and *Russell & Deal* for appellant.

(1) The court should have stricken out the plaintiffs' amended petition, because it was inconsistent with, contradictory of, and a departure from the allegations of the original petition. The original petition charges that the accident occurred on the defendant's "Tramroad" because of the negligence of the engineer, a fellow-servant. The amended petition charges that it occurred on the St. Louis & Gulf Railway because of the negligence of the defendant in not blocking the frogs of said railway. This was an entire change of the cause of action and required additional and different proof. Sims v. Field, 24 Mo. App. 557; Lumpkin v. Collier,

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69 Mo. 170. (2) The court should have sustained a demurrer to the plaintiffs' testimony. Because the petition and evidence both show that the accident occurred upon a railroad not owned or leased by the defendant, it merely had the right to run log trains over it. Because the law did not require the defendant to block the frogs of the St. Louis & Gulf Ry. Co., and its failure to do so was not negligence. Because there was no competent testimony showing that the accident was the result of anyone's negligence save his own. Because even if the accident was caused by the negligence of the engineer, he was a fellow-servant with the deceased and the defendant would not be liable for his negligence. R. S. 1899, sec. 2875; Dysart v. Railway, 145 Mo. 83. (3) The defendant offered, and should have been permitted to prove, that the deceased had been released by his father and was working for himself at the time of the accident. The law which authorizes damages in such cases, provides that it shall be "with reference to the necessary injury resulting from such death." R. S. 1899, sec. 2866. Damages in such cases are compensatory, and this evidence was certainly competent and important for the jury to hear and consider in determining the question of the plaintiffs' damages. Hennessy v. Brewing Co., 63 Mo. App. 111; s. c., 145 Mo. 104; Parsons v. Railway, 94 Mo. 286. (4) Instruction No. 2, given for the plaintiffs, was erroneous. We know that the courts have sometimes held that children of young and tender age, not expected to exercise the same care as adults, but we know of no case where the courts have relaxed the rule requiring care on the part of an employee who was over eighteen years of age, working for himself and weighing 150 pounds. Van Natta v. Railway, 133 Mo. 13; Eswin v. Railway, 96 Mo. 290. (5) Instruction No. 3, given for the plaintiffs, was erroneous because it assumed that the defendant was guilty of a wrong, and because the measure of damages was not properly defined. This instruction authorized a

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recovery of five thousand dollars, the amount prayed for in the petition, without any regard whatever to the injury done or the loss sustained. Knight v. Lead Co., 75 Mo. App. 541; Flint v. Railway, 38 Mo. App. 94. This error was not cured by giving other correct instructions. Jones v. Talbot, 4 Mo. 279; Hickman v. Griffin, 6 Mo. 37.

*Joe W. Moore, J. A. Stallcup* and *H. C. O'Bryan* for respondents.

(1) The defendants contend that the amended petition should be stricken out because it changes the cause of action. In Lincoln v. Railroad, 75 Mo. 27, it was held that in an action for damages for the killing of stock because of the failure of the railroad company to maintain cattle guards, the petition could be amended alleging that the injury was caused by a defective crossing. Gurley v. Railroad, 35 Mo. App. 87; Robertson v. Railroad, 21 Mo. App. 633. (2) The fact that the Himmelberger-Harrison Land & Lumber Company had operated their trains daily over the St. Louis & Gulf Railroad, in absence of proof of lessor and lessee, would constitute, to say the least, the relation of licensor and licensee, and the courts of this State have held that the same responsibility attaches to the relationship of licensor and licensee as to that of lessor and lessee. McCoy v. Railroad, 36 Mo. App. 445. Lessees or operators of a railroad are equally as liable as the lessors or owners for damages arising out of injuries sustained by reason of unlocked frogs or guard rails. R. S. 1899, sec. 1125. (3) There was no error in refusing to admit evidence on the emancipation or release of Emmet Coleman by his father. The parent is entitled to the services of the child. Brown on Domestic Relations (2 Ed.), 81. This case arises out of a violation of a statutory law under R. S. 1899, sec. 1123, which makes



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it a penal offense for owners or lessees to operate a train of cars over a road with unlocked frogs or guard rails. In cases of this kind the damages are not solely compensatory and are not confined to strict computation of the earnings of the deceased. 94 Mo. 286. (4) The contention is made by the appellants that the petition contains no allegation concerning the guard rails and instruction number one is objected to for this reason. The language of the petition in this connection is as follows: "They further state that said track and sidetracks were unsafe and dangerous, in that at no place thereon were the frogs of the switches and guard rails blocked, as the law directs. (5) There was no error in instruction number two for plaintiffs. It is a question of fact for the jury to determine what degree of care should be required of a minor working in any capacity. Ridenhouse v. Railway, 102 Mo. 270; Spillane v. Railway, 111 Mo. 555; Burger v. Railroad, 112 Mo. 238. (6) There was no error in instruction number three for plaintiffs. An instruction general in its nature as to the measure of damages is not erroneous. Browning v. Railroad, 124 Mo. 55; Haymaker v. Adams, 61 Mo. App. 581.

STATEMENT.

Omitting caption, the original petition is as follows:

"Plaintiffs state that the defendant is a corporation duly organized under the laws of the State of Missouri and as such corporation is now, and has for a long time been the owner of and engaged in running and operating a locomotive and train of cars for the transportation of said logs and freight, from a point about fifteen miles below Morehouse, in New Madrid county, north to and in the town of Morehouse, in said county on its line of railroad by it constructed, operated, managed and known as the tramway or tramroad and fur-

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ther, plaintiffs state that in the month of July, 1902, defendants ran and operated said tramway and railroad on its said lines in the town of Morehouse aforesaid, by running its engine and log cars thereto attached on its tracks in said town. That on the twelfth day of July, 1902, the plaintiffs' son, Emmett Coleman, a minor, without the knowledge and consent of the plaintiffs and against his express orders to the defendant, was placed at work by defendant on its train of log cars in said town of Morehouse as brakeman and fireman. That while said engine and cars were switching on its track and after the said switch had been made and when it was the duty of the engineer in charge of said train to slow up or check the speed of said train so that plaintiffs' said son could again get upon the cars as brakeman, yet nevertheless, said engineer negligently and carelessly failed to slow up or stop said train, although signalled so to do, by plaintiffs' said son, after so signalling said engineer and supposing said signal would be heeded or that in any event the speed of said train would be sufficiently checked to enable him to get thereon in the discharge of his duties undertook to get upon said train as brakeman, that in such effort, owing to the speed of the train and the engineer's failure to check the same, he fell between the cars of said train and was run over by the entire train, mangled and killed.

"That it was the duty of said engineer after said switch had been made to stop said train or sufficiently check its speed as to enable plaintiffs' son to get thereon, both of which the said engineer carelessly and negligently failed to do. That plaintiffs' said minor son was by the defendant carelessly, negligently and against the express orders of plaintiff to defendant, placed at work as fireman and brakeman on said train.

"Plaintiffs further state that their said son was of the age of eighteen years, unmarried and without issue, was strong and vigorous in mind and body and was

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capable of earning one hundred to one hundred and fifty dollars per month.

"Plaintiffs further state that by reason of the death of their son resulting from said carelessness and negligent acts of defendant he has not only lost the use of the service of his said son but also his companionship and presence and has suffered great anguish of body and mind.

"And plaintiffs further state that by the aforesaid negligence of defendant in the killing of their minor son they have been damaged in the sum of five thousand dollars for which with costs they ask judgment."

At the March term of the circuit court, plaintiffs filed the following amended petition:

"Plaintiffs state that they are husband and wife, and was the father and mother of one Emmett Coleman, a minor of the age of eighteen years, who was killed on the twelfth day of July, 1902, in New Madrid county. That said Emmett was single and unmarried, and left no children or their descendants.

"That on the twelfth day of July, 1902, and now defendant was and is a corporation organized under the laws of Missouri under the corporate name as styled above, and was engaged in the manufacture of lumber and building material; that it owned large plants for such purposes and large bodies of timbered lands from which it cut and from which it transferred saw stocks for manufacture at their said plants.

"That said defendant had large forces under its employment, getting out said stocks, and they transported said stocks from the forest where cut to the mill and plants where manufactured over the tracks, side tracks and switch tracks of a certain railroad known and incorporated under the corporate name of the St. Louis & Gulf Railway, and that it operated locomotives, engines and cars on said track by servants and agents under its employment upon which to transport said saw stocks.

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"That on, to-wit: twelfth July, 1902, said plaintiffs had hired their son Emmett to said defendant to serve and work in and upon certain section work on said road and expressly and positively forbade the defendant to use the service of said Emmett in the operation or in connection with the operation of said trains, or locomotive engine.

"They further state that said track and side track were unsafe and dangerous in that at no places thereon were the frogs of the switches or guard rails blocked as the law directs, which facts were well known to the defendant. That notwithstanding the dangerous and unsafe tracks, rendered so by unlocked frogs and switches, and notwithstanding the positive prohibition of plaintiffs to defendant, the defendant wantonly and negligently put said Emmett to work in the capacity of a fireman, switchman, brakeman and operator of engine and cars, and while so employed and while exercising due care and diligence said Emmett's foot became caught and fastened in an unblocked frog on said track, and, though he gave warning of his peril, the locomotive engineer in defendant's employ carelessly and negligently ran the engine and cars over said Emmett, inflicting painful and mortal wounds upon his body from which he died on the same day. They further charge that said locomotive engineer was unskilled in the operation of engines, which fact was also known to the defendants.

"They further state that Emmett had an earning capacity of fifty dollars per month, that by reason of his death they have lost his wages and company. That they are damaged thereby in the sum of five thousand ($5,000) dollars, in which sum they pray for judgment and for costs."

Defendant moved the court to strike out the amended petition on the following grounds:

"Because the same sets up a cause of action not embraced in the original petition and is a departure from the original cause of action in this, that the said original

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petition was based upon the alleged negligence of the engineer, a fellow-servant, while the said cause of the amended petition is based upon the alleged and pretended negligence of the defendant.

"Because the said amended petition would require entirely different and additional proof from the cause of action alleged in the original petition."

The motion to strike out was overruled by the court and the defendant filed the following answer:

"Now comes the defendant and for answer to the plaintiffs' petition denies each and every allegation therein contained, that is not hereinafter admitted.

"Defendant admits that it is a corporation under the laws of Missouri, and as such engaged in the manufacture of lumber and building material.

"Further answering, the defendant admits that Emmett Coleman was employed by it and was in its employ on the twelfth day of July, 1902, as brakeman or switchman and that he was on the said date accidentally run over and killed by a train of cars, operated by the defendant's employees upon railroad track owned and controlled by the St. Louis & Gulf Railroad Company.

"Defendant further answering, says that Emmett Coleman was at the time of his injury an employee of the defendant and by accepting such employment he thereby assumed all risks incident to the ordinary discharge of said duties as were imposed upon him and all risks that might arise by reason of the negligence of his co-employees and fellow-servants.

"The defendant further says that the injury received by the said Emmett Coleman was the result of his own negligence and carelessness in slipping down or falling down in front of a moving train.

"Wherefore the defendant asks judgment for costs."

A reply was filed denying the new matter alleged in the answer.

The evidence is that defendant operated a large

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plant for the manufacture of lumber at Morehouse, Missouri; that south of Morehouse it owned a large tract of timber lands from which it supplied its mills with saw logs. Logs were hauled to the mill over the St. Louis & Gulf Railroad on tramcars owned by the defendant. It appears from the evidence that the defendant constructed a railroad from Morehouse to its timber lands which was afterwards taken in by the St. Louis & Gulf Railroad Company under some arrangement not disclosed by the record, by which the defendant was permitted to haul, with its own engine and cars logs from its lands to Morehouse, and that it kept that part of the road in repair but had no lease on it, but was operating it under a license to run its log trains over the road. About nine o'clock a. m., July 12, 1902, Emmett Coleman, while working in the capacity of brakeman and switchman on one of defendant's log trains, was run over and injured by the train, from which injury he died in the afternoon of the same day. He was eighteen years and two months old on the day of his death. Plaintiffs are his father and mother. J. H. Himmelberger was the president and general superintendent of the defendant. Alex Mobley was its section boss. J. F. Vickery was the engineer in charge of the train that ran over Emmett Coleman. Prior to June 1, Emmett Coleman had been employed by defendant through Mobley, its agent, and was working under him as a section hand on the railroad track. He had never performed any train work prior to July 12. On the morning of the accident one of the train men was sick and Coleman was ordered by Mobley to take the place of the sick man. He went to work on the train about six o'clock a. m. The train consisted of an engine, tender and two tram or log cars. These cars are described as having no platform or floor. They were constructed for the sole purpose of hauling logs. The engineer wanted to back in on a Y at Morehouse; to do this it was necessary to throw a switch and Coleman

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was directed to throw the switch. Forty-six feet west from the switch block and in the direction the train was backing, was an unblocked frog on the opposite side of the road from the switch block. After the switch was thrown the train moved back in obedience to a signal given by Coleman, according to defendant's evidence. In backing it passed over the feet and legs of Coleman, and he was found on the track between the rails, fifty-five to sixty feet west of the switch, and twenty to twenty-five feet beyond and west of the frog. In the frog was found the heel of one of Coleman's shoes and a part of one of his toes. His hat and pocketbook were picked up between the switch and the frog. Plaintiffs and a number of other witnesses testified that Emmett Coleman was conscious after he was taken to his home (a quarter of a mile from the place of the injury) and that he stated to his father and mother that he caught his foot in the frog, saw that he could not get out and gave three signals to the engineer to stop and if he had paid any attention to the signals he could have been saved. The father of the boy testified that he gave his consent for the boy to work on the section, but said: "I told Mobley I wanted him to take the boy down on the section and work him and treat him right, and if he gets out of line you tell me and I will put him in line. I told him I wanted him to keep him there the year round, to keep him out of all danger, and not to work him on any train or machinery, and if any change is made to let me know, and I would look after that myself, that we would consult about any changes." That the boy was put to work on the train without his knowledge or consent; that he was under age and awkward but was large and strong and weighed about one hundred and fifty pounds. The evidence shows the boy was earning one dollar and twenty-five cents per day as a section hand and that he was to receive one dollar and fifty cents a day as a brakeman. The father testified that he received the earnings of his son. The evidence for the defend-

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ant shows that in the situation he was in when he threw the switch, the boy should have stood at the switch block and mounted the engine as it passed by stepping on the footboard on the front part of the engine; that if he had done this, even if he missed his footing and fell, he would not have fallen under the engine and would have escaped injury. It also shows that Mobley was on the engine at the time, performing the duties of fireman. He testified that when Coleman threw the switch he gave the signal to back up, and that he repeated the signal to the engineer and the train was then backed up. The engineer testified that he did not see Coleman at the switch, that he was not visible to him; that he knew nothing about his whereabouts until the alarm was given after the train passed over him.

Isaac Overman, a witness for defendant, testified that he was sitting on the back end of the tender and saw Coleman when the train was backing up; that Coleman gave the signal to back up, and as the cars were backing down the side track, he tried to get on the first car at the front end, that he placed his foot on the boxing over the axle of the wheel of the car and either slipped or became overbalanced and fell in front of the car; that Lee Coleman was sitting by him and he heard his halloo; that Coleman did not run down the track, cross over it and get his foot fastened in the frog. This witness and several others testified they heard Coleman tell his mother after he was hurt that it was an accident and no one was to blame for it. The mother testified in rebuttal that her son made no such statement to her.

George Murphy testified that at the boy's request he walked back and picked up his hat about eight or ten feet from the switch, and his pocketbook a few feet further down toward the frog.

Alex. Mobley testified that James Coleman never told him the boy's age; that he never hired the boy from him nor asked his consent to hire

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him; that the father never said to him that he did not want the boy to work on a train or about machinery; that he did not know the boy's age but supposed from his appearance and size that he was twenty-one years of age or over; that the boy was anxious to work on the train, said he wanted to learn that kind of work and that he put him on the train the morning he was hurt at his own request. The officers and agents of the company, who knew Emmett Coleman, all testified that they had no information about the boy's age, and made no inquiry about it but supposed from his size and appearance he was twenty-one years of age or over. The evidence shows that he was paid his wages by checks drawn in his favor by the company and that he indorsed and cashed them himself.

A diagram of the situation, which is admitted to be substantially correct, is contained in the record. This diagram shows that the side track which the train was on runs east and west; that it curves to the south and that the train was backing from east to west; that the only frog anywhere near the switch block is forty-six feet west of it and on the opposite side of the track.

The court gave the following instructions for the plaintiffs:

"1. The court instructs the jury that if they believe from the evidence that the death of Emmett Coleman was caused by his foot becoming fastened in an unblocked frog or guard rail, contributory negligence on his part will not excuse defendants from liability in this case.

"2. The court instructs you that the law does not exact of one who is a minor that caution and care it demands of adults, but the jury are at liberty, in considering the question of whether Emmett was negligent or careful, the fact that he was a boy and the maturity or immaturity of his judgment and discretion.

"3. The court instructs you that this is a suit for tort or wrong, and not a suit for services or wages, and

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if you should find the issues for the plaintiff you may take into consideration and award them such judgment as in your opinion will compensate them for such wrong. You can also consider, in estimating said damage, their money loss occasioned by his death, but in no case can you give them more than they sue for.

"4. The court instructs you that if you believe from the evidence, Emmett Coleman was hired by his father to the defendant, through its agent, Alex Mobley, to work on section work, with or without directions as to employment on train work, and that thereafter said Emmett was put to work on a train without his parents' knowledge or consent, and that said train work was attended with perils and dangers not incident to the section work, that the act of Mobley was wrongful and Mobley's act was the act of his employer. If you believe from the evidence that he was authorized to employ, superintend and control said men under his employ, and if you so find, then the wrongful acts of Mobley became the wrongful acts of his employer, and if you believe from the evidence while so employed and while said Emmett was so engaged he was mortally wounded by the cars or engines running over him, from which he died, either through the carelessness of the engineer on engine or from his foot being caught in an unblocked frog, and that said Emmett was exercising care, then in such case the plaintiffs should recover such verdict as in your judgment will compensate for their injury, not exceeding amount sued for in the petition."

The following were given for defendant:

"3. The court instructs you that while it was the duty of the defendant to use reasonable care to guard against the probable evil result to employees from defective appliances, it was not required to guard against results or accidents that were unexpected or improbable.

"6. The court instructs you that it devolved upon the plaintiffs to establish their case by a preponderance

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of the evidence, and unless they have done so in this case you should find for the defendants.

"8. The court instructs you that if you believe from the evidence that the defendant in this case was not guilty of any wanton or willful negligence resulting in the death of said Emmett Coleman, then in no event, even if you believe plaintiffs are entitled to recover, can they recover anything more than the actual probable damages by reason of the loss of his services during his minority."

The following were asked by defendant and refused:

"1. The court instructs you that upon all the evidence offered in this case that plaintiffs are not entitled to recover, and your verdict should be for the defendant.

"2. The court instructs you that the said Emmett Coleman, by accepting employment from the defendant to work as a brakeman or switchman on its train of cars, assumed all ordinary risks incident to the discharge of his duty, and all risks arising by reason of the acts or negligence of his fellow-servants.

"4. The court instructs you that the engineer in charge of the engine at the time of the injury and the said Emmett Coleman were fellow-servants, and if you believe from the evidence that the injury was caused by the negligence of said engineer in running the train at an improper time or too rapidly, or was otherwise negligent and thereby causing the injury and death of the said Coleman, then in such case it was the negligence of the fellow-servant, for which the defendant is not liable, and your verdict in that case should be for the defendant.

"5. The court instructs you that unless you believe from the evidence that the son of the plaintiffs, Emmett Coleman, did get his foot fast in the frog of the railroad and was by that reason struck, injured

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and killed by defendant's train, then you should find for the defendant.

"7. The court instructs you that even if you should believe and find from the evidence in this case that the plaintiffs are entitled to recover, you should then only allow them compensatory damages, that is, such damages as you believe and find from the evidence they have sustained by reason of the loss of their son's services, until he would have arrived at the age of twenty-one years."

The jury found for the plaintiffs in the sum of two thousand dollars. Motions for new trial and in arrest were filed and by the court overruled. Defendant appealed.

BLAND, P. J. (after stating the facts as above). —1. The death of plaintiffs' son alone did not constitute a cause of action against the defendant. His death, if caused by the negligence of defendant, would constitute a cause of action. The two things must concur and co-exist; death, and death caused by the negligence of the defendant, to entitle plaintiffs to recover. The cause of action, therefore, was the death caused by defendant's negligence. In both petitions the same death is relied on as one of the elements going to constitute the cause of action, and the negligence of defendant as causing the death is the other element. The only difference in the two petitions is in the allegations of the facts going to show the negligence of the defendant. There was, therefore, neither the substitution of another death or a new cause of death in the second petition. No change was made in the entire scope and purpose of the action by the amendment, and we think the amendment was permissible under our code system of practice. Ross v. Mineral Land Co., 162 Mo. 317; Lincoln v. Railway, 75 Mo. 27; Stewart & Jackson v. Van Horne, 91 Mo. App. 647; Bernard, Adm'r v. Mott, 89 Mo. App. 403.

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2. It is not claimed by plaintiffs that the defendant is a railroad corporation owning or operating a railroad within the meaning of section 2873, R. S. 1899, and liable under that section for damages occasioned to one servant by the negligence of his fellow-servant. It is admitted by the defendant that the deceased was engaged in a hazardous employment at the time he was injured and that he was put to that work by Mobley, his boss. Plaintiff's evidence is that the deceased was under age; that he was hired with his father's consent to work as a section hand on the road under Mobley, but that Mobley was expressly forbidden by the father to put the boy to work on a train or in the mill. If this evidence be true, then the defendant, by its agent Mobley, was guilty of putting an inexperienced boy at a dangerous employment against the will and contrary to the express orders of his father, and there was no valid contract of hire for this particular work as between the plaintiffs and the defendant, and the relation of master and servant between the boy and the defendant was not created. In such circumstances the defendant would be liable for the death of the boy, unless it should be shown that his injury and death were the result of his own willful act. His negligence would not excuse the willful misconduct of the defendant in placing him in a place of danger against the express directions of his father. The fourth instruction given for plaintiffs substantially so declares the law and we think it was appropriate under this phase of the evidence. To meet this phase of the evidence, the defendant offered evidence tending to show that the father had emancipated the boy prior to the time he was hired by the defendant but the court excluded this evidence. We think this was error.

3. The first instruction given for the plaintiffs made it amenable to the penalty of section 1125, R. S. 1899, visited upon all companies and corporations operating any railroad that have failed to block all switches, frogs and guard rails on the road in all yards, divis-

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ional and terminal stations, and where trains are made up, as required by section 1123, R. S. 1899. The evidence shows that the defendant had a section boss and a gang of section men working under him on the part of the road used by the defendant company. It is therefore reasonably inferable that its duty was to keep that portion of the road in a reasonably safe condition and to block frogs, etc., as required by section 1123, supra. But the instruction is broader than the statute. Whether or not the frog, where it is claimed Coleman got his foot caught, was within a yard or at a divisional and terminal station is not made clear by the abstract of the evidence furnished us; and if it was not admitted by the defendant that the frog was at one of these places, then it should have been submitted to the jury to find whether or not it was within the territory where the statute requires the company operating the road to block switches and frogs. This instruction also ignores another phase of the case. The uncontroverted evidence is that the boy in the performance of the duty he undertook (to throw the switch) was not required to go on the side of the track where the frog was situated; that the frog was forty-six feet west of the switch block and there was no necessity for him to go near the frog, therefore, if he did go to the frog and get his foot fastened in it, he did not do so in the performance of any duty required of him by the defendant. The act was of his own volition, not in the discharge of any duty enjoined on him by the defendant and the defendant is not liable for the resulting injury, unless intervening negligence is shown, on the part of the defendant, that directly contributed to the injury and resulting death, provided the boy sustained the relation of servant to defendant.

4. The second instruction for plaintiff is erroneous. It is not correct to say that the law does not exact of one who is a minor, that care and caution that it demands of an adult. A child of very tender years

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is not chargeable with contributory negligence under any circumstances. A child not of tender years, say seven or eight years of age, is bound to use such care as children of his age, capacity and intelligence are capable of exercising. Perkin v. McMahon, 27 L. R. A. 206; Id. 154 Ill. 141. The care a minor is bound to use is that care that persons of his age, capacity and intelligence are capable of using in like circumstances. People of New York v. Andrews, 6 L. R. A. 128; Consolidated Traction Co. v. Scott, 33 L. R. A. 122. There is no arbitrary rule fixing the age when a youth may be declared wholly capable of understanding and avoiding danger. Barney v. Railway, 126 Mo. 372. Yet it seems to us that a youth eighteen years of age, of ordinary intelligence and experience, should show some incapacity in addition to his minority to warrant a court in directing, as a matter of law, that he was not required to use the same care as an adult.

5. It is contended by defendant that the instruction in respect to the measure of damages is erroneous. The assessment of the damages was left to the discretion of the jury. They were authorized to assess such damages as in their judgment would compensate plaintiffs for the loss of their son, not to exceed the sum of five thousand dollars. No rule by which to measure the damages is contained in this instruction. The action falls within the second section of the damage act (section 2865, R. S. 1899). The next succeeding section provides that the jury may give such damages, not exceeding five thousand dollars, as they may deem fair and just with respect to the "necessary injury" resulting from such death to the surviving party entitled to sue; also having reference to the mitigating or aggravating circumstances attending the wrongful act, neglect or default causing the death.

In Rains v. Railway, 71 Mo. 164, it is said: "The 'necessary injury' resulting to a parent from the negligent killing of his minor child within the meaning of

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the third section of the damage act (R. S. 1899, sec. 2866), consists in the loss of services of the deceased during minority, the cost of nursing, surgical and medical attendance and appropriate funeral expenses." And if there were any aggravating circumstances attending thereon resulting in the death they should be pointed out to the jury and the jury should be restricted to those pointed out in assessing the damages. In Leahy v. Davis, 121 Mo. 227, the rule for the measurement of actual damages announced in the Rains case was approved and it was held that circumstance in aggravation of the wrong resulting in the death were elements authorizing the assessment of punitive damages. The rule was again approved in Stumbo v. Duluth Zinc Co., 75 S. W. 185 (Kansas City Court of Appeals). Tested by these authorities the instruction is erroneous in respect to the measure of damages.

For errors herein noted the judgment is reversed and the cause remanded. *Reyburn* and *Goode, JJ.*, concur.

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## STATE OF MISSOURI, Respondent, v. POLLOCK, Appellant.

**St. Louis Court of Appeals, March 1, 1904.**

1. **INDICTMENT: Receiving Stolen Goods: Name of Owner.** An indictment against one for receiving stolen goods, which omits to name the owner of the goods stolen, is fatally defective; giving the name "Butler Brothers" is not sufficient because it is neither the name of an individual nor a corporation, nor a partnership composed of individuals whose names are given.

2. ———: **Verdict.** If the jury undertakes to set out in a verdict the elements of the crime of which they find the defendant guilty and make no reference to the indictment, every material element of the offense charged must be set forth in the verdict, otherwise it will not support a judgment.



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3. ——: ——. A verdict which found, without referring to the indictment, a defendant guilty of receiving stolen property, and failed to find that he knew the property was stolen, was not responsive to the indictment and a judgment rendered thereon should have been arrested.

Appeal from St. Louis City Circuit Court.—*Hon. Walter B. Douglas,* Judge.

REVERSED.

*Thos. B. Harvey* for appellant.

(1) The indictment is fatally defective in failing to sufficiently allege the ownership of the property charged to have been stolen by another, and subsequently received by this appellant. The indictment alleges that it was the property of and stolen from "Butler Bros.," but no allegation is made as to whether "Butler Bros." is a corporation or co-partnership, and if a co-partnership, the names of the individuals constituting the firm. State v. Jones, 168 Mo. 398; State v. Patterson, 159 Mo. 98. (2) The verdict is not responsive to the charge, and is insufficient to support a judgment, in that it does not find that the defendant knew that the property was stolen. 22 Encycl. of Pleading and Practice, 873e and citations; Clark's Crim. Proc., 485; 1 Bishop, New Cr. Proc., sec. 1005; Wharton Cr. Pl. & Pr. (9 Ed.), sec. 756; Gibbs v. State, 34 Tex. 134; Weber v. State, 10 Mo. 8; State v. Whitaker, 89 N. C. 473.

*Joseph W. Folk,* for respondent.

(1) The allegation of ownership in the indictment is sufficient. Receiving stolen property knowing the same to be stolen, is made a distinct offense by Revised Statutes 1899, sec. 1916. The larceny is no part of the charge against the defendant. The gist of the offense

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is the guilty knowledge, and while it is essential to allege ownership it is in the nature of inducement and need not be pleaded with the same degree of particularity as would be necessary in charging the larceny as a principal offense. Bishop's Direct Forms (2 Ed.), sec. 918; 1 Bishop's New Crim. Proc., secs. 554-5; State v. Honig, 78 Mo. 249; State v. Jacobs, 39 Mo. App. 122. (2) It is not necessary to allege or prove that the receiver knew from whom the property was stolen, nor the time or place of the larceny, nor the name of the thief. Kelley Crim. Law, 683; State v. Smith, 37 Mo. 38; State v. Guild, 149 Mo. 370. (3) It is not fatal after verdict that the indictment does not allege from whom the property was stolen. (4) The defect complained of is not one that tends to the prejudice of the substantial rights of the defendant on the merits, and if it is not, it can not invalidate the indictment. Revised Statutes 1899, sec. 2535. (5) The verdict is sufficient. A verdict is not bad for informality or clerical errors in the language of it, if it is such that it can be clearly seen what is intended. It is to have a reasonable intendment and is to receive a reasonable construction, and must not be avoided except from necessity. Clark's Crim. Proc., 486; State v. Ray, 53 Mo. 345; State v. Cook, 58 Mo. 546; State v. Robb, 90 Mo. 30; State v. Sweeney, 93 Mo. 38; State v. Clarkson, 96 Mo. 364; State v. Elvins, 101 Mo. 242.

STATEMENT.

At the October term, 1902, of the criminal division of the St. Louis circuit court, the grand jury returned the following indictment against the defendant:

"The grand jurors of the state of Missouri within and for the body of the city of St. Louis, now here in court, duly empaneled, sworn and charged, upon their

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oath present, that Alexander J. Pollock, on the fifteenth day of October, one thousand nine hundred and two, at the city of St. Louis aforesaid, two gold watches, one pair of gold cuff buttons, one plated watch chain, all of the value of fifty dollars, of the goods, chattels and personal property of Butler Bros., then lately before feloniously stolen, taken and carried away from the said Butler Bros., with the intent on the part of the thief to permanently deprive the owner of the use thereof, feloniously and fraudulently did from said thief buy, receive and have, he the said Alexander J. Pollock, then and there well knowing the said goods, chattels and personal property to have been stolen, taken and carried away with the intent as aforesaid, to permanently deprive the owner of the use thereof; contrary to the form of the statute in such case made and provided and against the peace and dignity of the state.

"W. SCOTT HANCOCK,
"Assistant Prosecuting Attorney."

A jury was empaneled to try the cause who, after hearing the evidence and receiving the instructions of the court, returned the following verdict:

"We, the jury in the above entitled cause, find the defendant guilty of receiving stolen property of less than thirty ($30) dollars in value and assess the punishment at six (6) months in jail and a fine of one hundred ($100) dollars.

"S. H. BURT,
"Foreman."

A timely motion for new trial was filed which the court overruled. This was followed by a motion in arrest of judgment based on the sole ground that "the verdict of the jury is insufficient in law to sustain a judgment." This motion was likewise overruled. Defendant appealed.

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BLAND, P. J. (after stating the facts as above). —1. One of the grounds for the motion for new trial was that the evidence was insufficient to warrant a verdict of guilty, and counsel for appellant insist here that there is no sufficient evidence of defendant's guilt to support the verdict. We do not deem it necessary to summarize the evidence or to discuss its probative force as we shall dispose of the appeal on other grounds.

2. The sufficiency of the indictment to support the judgment is attacked on the ground that it fails to allege the ownership of the property charged to have been stolen; that the designation of Butler Brothers as the owners of the property does not point out or individuate the owner of the goods. Butler Brothers is not the name of an individual, is not described in the indictment as a partnership composed of individuals whose names are given, nor as a corporation. Butler Brothers designates neither an individual, corporation or partnership, hence the owner of the stolen goods is not named in the indictment. It is a well-settled rule of criminal pleading that in indictments for larceny and in all other indictments for crime, in which the commission of a trespass against the person or property of another is an essential ingredient of the offense, the name of the person specially injured should be stated in the indictment. State v. Jones, 168 Mo. 398; St. Louis v. Buss, 159 Mo. 9. In the Jones case it was held that the failure to name the owner of the store alleged to have been burglarized was fatal to a judgment on conviction and that the defect might be raised for the first time in the appellate court. Receiving stolen goods, knowing them to have been stolen, is an offense separate and distinct from the larceny of the goods (sec. 1916, R. S. 1899), and the receiver does not, by the act of receiving the goods, knowing them to have been stolen, commit a trespass against the owner of the property. But the name of the owner is descriptive of the offense, though

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the name of the thief is not, as was ruled in State v. Smith, 37 Mo. 58; and State v. Guild, 149 Mo. 370. To warrant a conviction of the offense of receiving stolen goods, knowing them to have been stolen, it is indispensable to allege and prove that the goods were stolen and the name of the owner, if known. State v. Whitaker, 89 N. C. l. c. 474; Commonwealth v. Finn, 108 Mass. 466; Kelly's Criminal Law and Practice, sec. 683; 2 Bishop's New Criminal Procedure, sec. 982. For omitting to name the owner of the stolen goods the indictment was fatally defective. This defect may be raised for the first time on appeal. State v. Jones, supra; State v. McAloon, 40 Me. 133; Miller v. People, 13 Colo. 166.

3. It is further contended by appellant that the verdict is not responsive to the charge in the indictment in that it did not find the defendant knew the goods were stolen. In volume 22, at page 873, Ency. of Pleading and Practice (2 Ed.) it is said: "A verdict in a criminal case must be responsive to the charge in the indictment or it will not support a judgment." While a general finding of guilty as charged in the indictment, or of guilty, fixing the punishment, is sufficient, if the jury undertakes to set out in a verdict the elements of the crime of which they find the defendant guilty and make no reference to the indictment, every material element of the offense charged must be set forth in the verdict, otherwise it will not support a judgment. State v. French, 50 La. Ann. 461; People v. Cummings, 117 Cal. 497; 1 Clark's Criminal Procedure, 485; Bishop's New Criminal Procedure, sec. 1005. Dr. Wharton says (Wharton's Criminal Pleading and Practice, sec. 756): "A verdict defective in omitting an essential ingredient is a nullity." In Weber v. State, 10 Mo. 4, Weber was indicted for a libel on Geo. Morton. The verdict was: "We, the jury, find the defendant guilty of charging Mr. Morton of being a visionary, worthless speculator." No malice was found

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by the verdict of the jury. As malice was the very essence of the offense of libel, it was held that the verdict would not support a judgment. In State v. Whitaker, supra, the charge was that the defendant received the cotton of James H. Parker knowing it to have been stolen. The jury found: "He is guilty of receiving stolen cotton." It was held that the verdict was not responsive to the indictment and the court said, among other things: "The defendant may have received the cotton without any knowledge at the time of receiving it, that it had been stolen," and that "it would be error to pronounce judgment on such a verdict." The verdict returned against the defendant contains the same defect. The jury found that he received the stolen goods but did not find that he knew they had been stolen. Knowledge of the fact that they had been stolen was of the very essence of the crime. The verdict, therefore, was not responsive to the indictment and the judgment thereon should have been arrested.

The judgment is reversed. *Reyburn* and *Goode, JJ.*, concur.

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## RHODES, Respondent, v. HOLLADAY-KLOTZ LAND AND LUMBER COMPANY, Appellant.

St. Louis Court of Appeals, March 1, 1904.

1. **PLEADING: Replication: Evidence.** Evidence is properly admitted to prove averments of new matter in a replication, which go to contradict the allegations of the answer, although the petition contains no averments on the subject.

2. **CONTRACT: Construction of.** The contract, for breach of which suit was brought, provided that the defendant was to furnish logs at the plaintiff's saw mill in numbers "limited by the reasonable convenience" of the defendant, to endeavor to supply logs sufficient to enable the plaintiff to run his saw mill all the time and cut such lumber as the defendant could sell

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each month, and "to log said mill to its capacity to cut, limited only by the amount of lumber the said party of the first part (defendant) should be able to sell at satisfactory prices." *Held*, the contract did not constitute the defendant judge as to the quality of the timber to be supplied to plaintiff, but that the purpose of the parties was to manufacture and sell marketable lumber. *Held* further, the phrase, "satisfactory price," in the contract should be a price which would yield the defendant a reasonable profit. *Held* further, the contract required the defendant to furnish timber from which could be manufactured salable lumber and to make reasonable efforts to put sound and salable lumber an the market, and if, by such efforts, sales at reasonable profits could be made, defendant was bound to furnish sufficient logs to keep the plaintiff's mill continuously running. *Held* further, that the plaintiff was obliged, when furnished with such sound lumber, to saw it in a workmanlike manner and of such dimensions as required by defendant.

3. **PLEADING: Replication: New Matter.** Under section 607, Revised Statutes of 1899, new matter may be set up in a reply, if not inconsistent with the petition, which constitutes a defense to a counterclaim set up by the defendant in answer.

4. ———: ———: ———. But the reply can not be used in aid of the petition to engraft thereon a material allegation which has been omitted, and it is error to instruct the jury authorizing a recovery by plaintiff on the proof of such allegation.

5. **CONTRACT: Damages for Breach of.** The measure of damages in actions for breach of contract is a matter of law for the court to declare in its instructions, and not a matter for the jury to speculate upon.

6. ———: ———: ———. In an action for failure to keep plaintiff's saw mill supplied with logs, according to contract, the measure of damages is the loss of the net profits which plaintiff would have realized from the operation of his mill if he had been supplied with logs according to the terms of the contract.

Appeal from Wayne Circuit Court.—*Hon. F. R. Dearing*, Judge.

REVERSED AND REMANDED.

*James F. Green* and *John H. Raney* for appellant.

(1) By the contract the defendant was constituted the judge as to the quality of logs to be furnished, and

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as to when prices for the lumber were satisfactory, and it is not liable where no intentional violation of the contract is shown. Blaine v. Knapp & Co. 140 Mo. 250; Mullaly v. Greenwood, 127 Mo. 146, Lawson on Contracts, sec. 409; Bass v. Henderson, 105 La. 691; Machine Co. v. Smith, 50 Mich. 565; Manufacturing Co. v. Ellis, 35 N. W. 841; Printing Co. v. Thorp, 36 Fed. 416; Singerly v. Thayer, 108 Pa. 291; Williams v. Railroad, 85 Mo. App. 110; Koehler v. Bull, 94 Mich. 496; Brown v. Foster, 113 Mass. 136. (2) The testimony as to the character of logs furnished was not admissible under the allegations of the petition. Woods v. Campbell, 110 Mo. 573; Redpath v. Manning, 42 Mo. App. 114; (3) Plaintiff must recover on the cause of action stated in the petition and none other; and instructions which permit a recovery outside of the specific cause of action stated in the petition are erroneous. Chitty v. Railway, 148 Mo. 65; Colliott v. Am. Mfg. Co., 71 Mo. App. 163; Milling Co. v. Transit Co., 122 Mo. 277; Yarnell v. Railroad, 113 Mo. 570; Mason v. Railroad, 75 Mo. App. 10; (4) By instruction No. 1 given for plaintiff, he was permitted to recover on purely defensive matter, set up in the replication to defendant's answer, and not upon the cause of action stated in the petition, namely, the alleged failure to supply a sufficient quantity of logs. No recovery can be had on matter set up in a reply. Crawford v. Spencer, 36 Mo. App. 78; Hill v. Mining Co., 119 Mo. 9; Mahoney v. Reed, 40 Mo. App. 99; McMahon v. Jenkins, 69 Mo. App. 287; Wonderly v. Christian, 91 Mo. App. 168; Stepp v. Livingston, 72 Mo. App. 177. (5) Plaintiff's first instruction is in direct conflict with defendant's fourth instruction. It is reversible error to give conflicting instructions, no matter at whose instance they are given. Bluedorn v. Railway, 108 Mo. 439; Frank v. Railway, 57 Mo. App. 186; Redpath v. Manning, 42 Mo. App. 112; Stone v. Hunt, 94 Mo. 475; Matowsky v. Hannibal. 35 Mo. App. 70; Frederick v. Allgaier, 88 Mo. 603. (6) Instructions must be based

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on both the pleadings and the evidence. Marr v. Baker, 92 Mo. App. 651; Tyler v. Hall, 106 Mo. 313; Paddock v. Sones, 102 Mo. 226; Wilkerson v. Eiler, 114 Mo. 245. (7) The court committed error in permitting the jury to view the lumber stacked in the yards of defendant. 1 Thompson on Trials, sec. 881; State v. Smith, 42 Tex. 444; State v. Bostwick, 61 Ga. 635; Holladay v. Jackson, 21 Mo. App. 670. (8) Plaintiff's second instruction fails to inform the jury as to the proper measure of damages, and it is also erroneous in assuming that there had been a breach of the contract on part of defendant. Morrison v. Yancy, 23 Mo. App. 670; Hyatt v. Railroad, 19 Mo. App. 302; Bridge Co. v. Schabacher, 57 Mo. 582.

*Smith & Anthony* and *Munger & Munger* for respondent.

(1) The contract meant that appellant company should furnish respondent with logs, "at Skidway at his mill," out of which he could manufacture marketable lumber, which appellant could sell on the markets at reasonable prices for that kind of material or it meant nothing. Leiweke v. Jordan, 59 Mo. App. 624; McManus v. Shoe Clothing Co., 60 Mo. App. 218; County of Johnson v. Wood, 84 Mo. 509; Williams v. Railroad, 153 Mo. 534; 1 Beach on Mod. Cont., secs. 708 and 711; 11 Amer. Dig. (Cent. Ed.) 718 to 735. (2) The construction of a contract does not depend upon what either party thought, but upon what both agreed. Chitty on Cont. (1894) 127; Bank v. Kennedy, 84 U. S. 28; Knapp v. Simon, 49 N. Y. 17; Brunheld v. Freeman, 77 N. C. 128. (3) The contract sued on implies that the logs to be furnished by appellant should be such that marketable lumber could be made out of them by respondent. The furnishing of the logs was a condition precedent, and the implication attached to the subject-matter of the contract and was a part of

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such condition. Bersch v. Sanders, 37 Mo. 106; Jones v. Walker, 13 B. Monroe 165. Oakley v. Martin, 62 Amer. Dec. 50; Mains v. Haight, 14 Barb. 81; 1 Beach on Mod. Cont., sec. 710; Kauffman v. Raeder, 54 L. R. A., 253; Turner v. Mellier, 59 Mo. 536; Randolph v. Frick, 57 Mo. 404. (4) Appellant could not make it impossible for respondent to manufacture a marketable grade of lumber by the inferior quality of logs furnished, and then because the product could not be sold for good market prices, refuse to sell the output of his mill on the ground that the prices were not satisfactory. Under the circumstances of this case what were satisfactory prices was a question of law. Berthold v. Electric Con. Co., 165 Mo. 304; Pope & Co. v. Best, 14 Mo. App. 502; Mullally v. Greenwood, 127 Mo. 138; 1 Beach on Mod. Cont., sec. 104, notes 3 and 4. "The law will determine for defendant when he ought to be satisfied," said Chancellor KENT in Folliard v. Wallace, 2 Johns. 395. (5) The failure of appellant to furnish a reasonably good quality of logs out of which fair marketable lumber could be manufactured, rendered the performance of the contract practicably impossible and was a partial repudiation of it, whereupon respondent had his action for the loss of his contract—his damages being the difference between the contract price and what it would have cost to perform the uncompleted contract. Chapman v. Railroad, 146 Mo. 493. (6) The law implying that the logs to be furnished, should be fit for the manufacture of marketable lumber; and appellant alleging in his answer that it furnished logs out of which lumber could be made as contemplated by the contract, which allegation respondent's reply denied, with the averment added, that the logs were bad and unfit to use for the manufacturing of salable lumber, made an issue as to the quality of logs supplied. To prove or disprove this issue, testimony was admissible to show the character of logs furnished. Contract implied that reasonably good logs would be delivered.

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Lawson on Cont., p. 61, sec. 57. Petition was aided by answer and reply. Garth v. Caldwell, 72 Mo. 630; Fisher v. Lead Co., 156 Mo. 485; Ricketts v. Hart, 150 Mo. 74. Replication was no departure from the petition, but it explains and supports it, and controverts and avoids the new matter set up in the answer. Kimberlin v. Carter, 49 Ind. 111; 6 Am. and Eng. Ency. Plead. and Prac., p. 465, notes 5 and 6. (7) Where the answer by way of new matter and a counterclaim pleads the contract (declared on in the petition) and sets forth particular provisions of it, the plaintiff in his reply may plead to such "new matter" by denying it, or confessing and avoiding it, and may introduce new matter if not inconsistent with the original cause of action, in examination and support of it, and that controverts and avoids the new matter set up in the answer. Cravens v. Hillilan, 73 Mo. 528; Hoover v. Railroad, 16 S. W. 482. The instruction on the measure of damage given by the court is assailed. It is not as general as the instruction in the Browning case, and it was approved. Browning v. Railroad, 124 Mo. 71; Wheeler v. Bowels, 163 Mo. 409; Boettger v. Ins. Co., 124 Mo. 104; Barth v. Railroad, 142 Mo. 555; Robertson v. Railroad, 152 Mo. 393.

STATEMENT.

The suit is on the following contract and modification thereof:

"This agreement, made and entered into this fifteenth day of July, 1899, by and between the Holladay-Klotz Land & Lumber Company, of the county of Wayne and State of Missouri, party of the first part, and Charles M. Rhodes, of the county of Wayne and State of Missouri, party of the second part.

"Witnesseth, that the said party of the first part for and in consideration of the stipulations, agreements and promises of the party of the second part, herein-

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after set forth, agrees to put in and maintain at its own expense the necessary railroad side tracks and switches to the saw mill proposed to be erected by party of the second part, to be located about one mile east of Greenville, on the land of Finis Stephens, said party of the second part to furnish right of way for same; the said party of the first part further agrees to furnish and supply oak saw logs, delivered at Skidway at said mill, in numbers to be limited by the reasonable convenience of the said party of the first part, and make such deliveries by the sales of such oak lumber that the said party of the first part may be able to make from time to time. It being understood that the said party of the first part will endeavor to supply logs sufficient to enable said sawmill of the party of the second part to run all the time and cut such lumber as said party of the first part can sell each month; said party of the first part agrees to log said mill to its capacity to cut, limited only by the amount of lumber said party of the first part shall be able to sell at satisfactory prices.

"Said party of the first part agrees to pay said party of the second part $3 per thousand feet, log scale, for sawing and loading said lumber at said sawmill. All lumber accumulated in sawing, that does not apply on orders, to be stacked on yard until ordered out, then to be loaded without cost to party of the first part. All slabs, edgings and waste material, except such as may be required for fuel to operate said mill, shall be property of party of the second part, and party of the first part hereby agrees to cut slabs, edgings and waste materials into suitable lengths for stove wood, to pile same in ranks in places accessible to teams, or put on cars direct from the mill, as required by party of the first part, without cost to said party of the first part; provided, however, that if said slabs accumulate in greater quantities than desired or can be used by said party of the first part, then said party of the second part to take

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them and deduct twenty-five (25) cents per M from price of sawing.

"The said party of the second part agrees to cut at his said sawmill all logs supplied by the said party of the first part, as aforesaid, into such lumber as required by the party of the first part on orders furnished, to keep a competent man in charge of his said sawmill at all times, and to use due care in sawing all logs to the best advantage, and to saw lumber smooth and even; to classify lumber as to grades and sizes; to load the lumber on cars or put it in stacks in workmanlike manner as said party of the first part may direct; to furnish sufficient yard to pile the lumber not immediately shipped; to limit the cut of said mill to the orders and timber of said party of the first part, and to load lumber from stacks to cars as it can be supplied on orders.

"The said party of the first part further agrees to advance to the said party of the second part 75 per cent of the amount earned, as logs are sawed into lumber, the same to be paid in goods and repair work, the balance due to be payable at the end of each month, the same to be ascertained and settled as may be agreed upon by the parties later. Should there be any material decrease in the price or market value of oak lumber, party of the second part agrees to reduce his price so as to stand his proportion of such decrease or loss. This contract to run two years, unless otherwise mutually agreed.

"In testimony whereof, the said parties to these presents have hereunto and also to one copy set their respective hands and seals, at Greenville, Missouri, on the date first above written.

"HOLLADAY-KLOTZ LAND & LUMBER CO.

"Per C. C. RAINWATER, Pres't. (SEAL).

"CHAS. M. RHODES, (SEAL).

"The within agreement is hereby amended by mutual consent of both parties as follows:

"In consideration of party of the second part agree-

ing to haul all wood which he cuts from slabs and waste accumulated in sawing lumber, and piling same along the line of the W. G. & S. L. R. R. on right of way of same, at convenient places to be designated by party of the first part: Party of the first part agrees to furnish to party of the second part necessary cars on their side track, at his mill for the purpose of loading all lumber on said cars as it is being cut by party of the second part, thereby releasing said party of the second part, from that part of his obligation requiring him to pile said lumber on yards, as stated within agreement."

After stating preliminary matters the petition is as follows:

"Plaintiff states that he has duly and faithfully performed all the conditions of said contract on his part to be performed, and has at all times been ready and able to cut all the logs on said mill when furnished him by defendant; but that defendant has failed to perform its part of said agreement, in that it has failed and refused to supply plaintiff with saw logs sufficient to keep said mill running all of the time, and has thereby caused said mill to be idle a great portion of said time, to-wit, for an aggregate period of two hundred and seventy-five days, to plaintiff's damage in the sum of four thousand four hundred and forty-nine dollars and fifty cents.

"Wherefore, the premises considered, plaintiff prays judgment against defendant for the said sum of four thousand four hundred and forty-nine dollars and fifty cents.

"Plaintiff for another and further cause of action herein states that on the — day of May, 1900, he was employed by the defendant to unload the saw logs from the defendant's cars at plaintiff's mill; that during the time intervening between said date and the first day of January, 1901 plaintiff unloaded for defendant as aforesaid four hundred and twenty-three cars; that his services in in unloading said cars are reasonably worth twenty

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cents per car; that though often requested to pay amount, defendant has failed and refused and still fails and refuses to pay the same.

"Wherefore, plaintiff prays for judgment against defendant in the sum of twenty cents per car, aggregating the sum of eighty-four dollars and sixty cents, and the costs of said suit."

After a general denial, except as to matters expressly admitted, the answer is as follows:

"Further answering said petition, defendant says that on the fifteenth day of July, 1899, it entered into a written contract with the plaintiff, by which it was to furnish logs to plaintiff's mill for the purpose of having the same sawed, and defendant says that among the clauses in said contract, are the following, viz.:

" 'That the said party of the first part (the defendant) further agrees to furnish and supply oak saw logs, delivered at Skidway at said mill in numbers to be limited by the reasonable convenience of said party of the first part (the defendant) and make such deliveries by the sale of such oak lumber that the said party of the first part may be able to make from time to time. It being understood that the party of the first part will endeavor to enable said sawmill of the party of the second part to run all the time, and cut such lumber as the party of the first part can sell each month; said party of the first part agrees to log said mill to its capacity, to cut, limited only by the amount of lumber said party of the first part shall be able to sell at satisfactory prices.'

"And the defendant avers that it fully complied with all the requirements of said contract on its part and furnished such logs during the time of the contract; that under the terms of said contract, it was only required to furnish such quantities of logs as it was able to sell at satisfactory prices and it avers that it furnished more logs than it was able to sell, and that, in fact, it now has on hand, of oak lumber, which it has been unable to dispose of, eight hundred thousand feet (800,

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000 ft.) which is still in and about the yards of defendant.

"For further answer and counterclaim to the petition of the plaintiff, defendant says that by the terms of said written contract plaintiff was required to saw and cut at his said mill all logs supplied by defendant into such lumber as required by defendant, and to use due care in sawing all logs to the best advantage, and to saw lumber smooth and even, to classify the lumber as to grades and sizes, and load the lumber on cars or put it in stacks in a workmanlike manner, as the defendant might direct.

"But defendant avers that plaintiff failed to saw and manufacture said lumber in a workmanlike manner, and to saw it smooth and even and failed and neglected to stack it in such workmanlike manner as would protect said lumber from decay and injury, and that in consequence thereof a large amount of lumber was sawed by the plaintiff for which defendant could find no sale, and that a large quantity of the same was piled in an indiscriminate and careless manner, so that it was exposed to the weather and became decayed, mildewed, and portions of it rotted; that in consequence of such negligence and carelessness on plaintiff's part about eight hundred thousand feet (800,000 ft.) of lumber is left upon defendant's hands in a damaged and injured condition, and which can not be sold, except at a loss; that defendant's loss upon said lumber will average four dollars per thousand; that in consequence of the negligence and carelessness of the plaintiff as above set forth, defendant has sustained damages in the sum of three thousand two hundred dollars, for which sum it asks judgment against the plaintiff.

"And for a further counterclaim against plaintiff, defendant says that about the first day of January, 1901, the plaintiff negligently, carelessly and wrongfully set fire to and burned and converted to his own use about



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eighty thousand feet (80,000 ft.) of lumber belonging to defendant, which had been sawed by plaintiff, of the reasonable value of eight hundred dollars, for which sum defendant also asks judgment.

"And having fully answered, defendant prays to be discharged."

The material parts of the reply are as follows:

"Further replying, plaintiff avers that the majority of the logs alleged to have been furnished by defendant were furnished in willful disregard of the terms and provisions of the contract, in this, that they were of inferior character; and plaintiff further avers that much of the timber manufactured therefrom was necessarily of a second grade quality, and yet, notwithstanding plaintiff avers that during the life of said contract the demand for oak and for all kinds of lumber for that matter, was so active, and prices so liberal and satisfactory as to have enabled the defendant, with its advantages, to sell or have disposed of the entire output of the plaintiff's mill at fair profits, had defendant endeavored to do so, and had defendant endeavored to comply with the terms and intent of said contract.

"Replying further, plaintiff admits that under the terms of the contract defendant was only required to furnish such quantities of logs as when sawed into lumber could be sold at satisfactory prices, and yet plaintiff avers that defendant was bound by its contract to furnish logs out of which good and salable lumber and millstuff could be manufactured for which good prices could be obtained, which plaintiff avers defendant knowingly refused and failed to do.

"Further answering, plaintiff avers that notwithstanding the inferior logs furnished as aforesaid, yet the lumber cut therefrom was cut in a workmanlike manner, was even and smooth, that is, as much so as the timber of the logs would permit, and such lumber sawed and cut, defendant was by the terms of its contract bound to diligently endeavor to sell, which plaintiff

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avers it refused to do, and which plaintiff further avers could have been sold for reasonable profits.

"Plaintiff denies that defendant has on its yards 800,000 feet of oak lumber, as alleged in its answer, coming from plaintiff's mill, which it avers it is unable to dispose of; but, on the contrary, plaintiff states that if it had such an amount of lumber on its yard, it is because defendant has refused to sell same, which it could have sold, as hereinbefore alleged for reasonable prices.

"Further replying with respect to defendant's counterclaims, plaintiff denies each and every allegation, averment and statement therein contained."

In his own behalf plaintiff testified, in substance, that he moved and set up his sawmill at the place designated in the contract and hired help and entered upon the performance of his part of the contract; that some logs were furnished him, but not enough to keep his mill running every work day in any one month during the life of the contract; that he lost, all told, two hundred and fifty days on account of the failure of defendant to furnish saw logs at his mill; that the capacity of his mill was 14,000 feet per day and that he cut on an average 11,600 feet per day; that his profits per day on the latter amount of lumber sawed would be $16.50; that it cost the defendant about $7.75 per thousand to produce the lumber sawed at his mill, and that No. 1 common oak lumber was worth on the market about $12.75 per thousand; that he was never without orders for lumber sent to him by the defendant, but that he was unable to fill many of these orders for want of logs; that there was very little change in the demand for 14 and 16 foot lumber in the spring of 1900, and but little change at any time during that year.

The plaintiff was asked the following questions:

"Q. Can you state, Mr. Rhodes, what was the character of the logs received at the mill, logs that were furnished you by this company?

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"The defendant objected to this question for the reason that there was no averment in the petition that there were any defects in the timber furnished the plaintiff. The objection was by the court overruled and to which the defendant then and there excepted.

"A. It was mostly all culled timber.

"Q. What do you mean by that? A. I mean that it was cut off from behind tie makers. They generally cut the best timber and the timber delivered to me was mostly all bad.

"Q. State whether it was doty or rotten?

"Defendant objected to this for the same reasons given above. The objection was overruled, to which defendant at the time excepted.

"A. There was a very large per cent of it that way."

He testified that he cut out or sawed the timber in accordance with the orders given him by the defendant company; that he complained to the company frequently that he did not have logs enough to keep his mill going.

He further stated that there was a demand for a better grade of lumber during the fall of 1899 and year 1900, and in the year 1901, the demand was good. He also produced a number of letters, forwarded to him by the lumber company, with reference to orders to be filled at his mill, which letters were read in evidence.

He made complaints to the officers of the lumber company about their failing to furnish him logs to keep his mill running, and stated that there were times when he had no logs on the ground, and that Mr. Reed, one of the chief officers of defendant, promised to supply him with logs.

He said that the lumber sawed which was not sent out for shipment on orders were properly piled by him; that Mr. Mason, who was manager of the sales department of defendant, said that it was properly piled; that there was no objection made until January, 1901, when

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he was required to stack the lumber on strips. In answer to the question how timber accumulated in the yards he said that was because much of it was too short and was graded as No. 2. In December, 1900, he burned several thousand feet of lumber that was rotten and worthless to get it out of the way; that Mr. Klotz, at that time president of defendant, saw it and told him not to burn any more. In May, 1901, he was employed by Mr. Newby, at that time manager of defendant, to unload logs, and from that time until the year 1902, he unloaded 423 cars of logs at his mill; that prior to that time the defendant had unloaded the cars, and that it was worth 25 cents a car to unload them; that Mr. Reed, an employee of defendant, told him that Mr. Klotz, when he became president of the company, had written to the salesmen on the road to raise the price of oak lumber $2 per thousand. He identified a number of orders which he was delayed in filling on account of not having logs to saw.

Plaintiff further testified that a good deal of the timber furnished him was bad; that a large per cent of it was doty and rotten and was of different lengths, and that the unsold lumber (about 800,000 feet) was 12 foot lumber and about seventy-five per cent of it was sawed out of doty and rotten logs and for this reason could not be sold.

Plaintiff introduced a half dozen or more letters from certain of defendant's customers complaining that their orders for oak lumber were not filled and urging the defendant to hurry up shipments.

Eli Klotz was made president of defendant company in January, 1901, and took charge of its business.

Plaintiff testified that after Mr. Klotz took charge he went to Mr. Reed, defendant's timber man, and called on him for logs; that Reed said to him, "I will tell you confidentially that you will not get to do much business for the reason that Mr. Klotz has told the

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salesmen to raise the price of oak $2 on the thousand which will result in none being sold."

On cross-examination plaintiff testified that a great deal of the unsold lumber was of an inferior grade and could not be sold; that the logs from which it was manufactured were too short and many of them were rotten or doty; that the mill, which he moved for the purpose of sawing logs for defendant, was one that he had been running off and on for eight years; that he lost some time on account of bad weather; that he occasionally had a break down of machinery which stopped his mill temporarily; that during the term of his contract with defendant, he sawed nearly three million feet of lumber; that defendant company sold about two million feet of this output and that the lumber was worth from $11 to $12.50 per thousand feet. He further stated that the defendant lumber company offered him the lumber, which was still on hands, for $6.50 per thousand; that all of the oak lumber on defendant's yards had been sawed by him and that the lumber company had paid him for several hundred thousand feet which it had not sold; that he was paid for all the lumber he sawed.

M. L. Rhodes, a witness for plaintiff (a brother of the plaintiff), whose deposition was taken at Shreveport, Louisiana, testified that part of the time during the years 1899 and 1900, he was employed by the lumber company as its secretary; that the lumber company did not furnish logs in sufficient quantity to keep plaintiff's mill running all the time, partly for the reason that it had its own mill, which is a mill for the purpose of sawing pine timber—located at Greenville, Missouri—and had to haul logs by rail to both mills, and could not conveniently haul to plaintiff's mill and also its own on account of lack of train service; that in such case the lumber company supplied its own mill first; that the manufactured produce of the plaintiff's mill was salable lumber and satisfactory to the customers, to whom such produce was sold by defendant; that during the years

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1899, 1900 and 1901, the demand for oak lumber of the kind sawed by the plaintiff was good; that as the agent of the lumber company, witness required plaintiff to restack some of the lumber piled by him; that Mr. Klotz, president of the defendant, objected to the manner in which the lumber had been piled by plaintiff and for this reason he required it to be restacked; that some of the lumber in the piles had been cut from unsound logs; that a portion of the lumber had been cut from sound logs and was not damaged.

He was asked why the lumber on hand had not been put on the market and sold and said that a large proportion of it was lumber that had been left over in filling orders, or sawing for particular sizes, and in so sawing, there would naturally be more or less lumber that would not apply on a particular order, and thus accumulate on hands.

He was asked, if by ordinary diligence the lumber company could have furnished sufficient orders to keep plaintiff's mill running all the time at satisfactory or reasonable prices, and said that it could, by using a better class of timber, and looking for a better class of lumber; and that while he was in charge of the sales department of the defendant, the company had orders which were not filled by him, and said, that he was subject to the orders of his superior officers, the president and general manager of the company, and that Mr. Klotz, president, directed him to return the orders and refuse to fill them; one objection he made, being on account of the price, and another reason, that at that time he did not want to handle much oak business; that the prices at which such lumber was sold were the prices made by the traveling salesmen; that he did not know of any complaint as to the manufacture of the lumber by the plaintiff. He further testified that plaintiff unloaded cars at the request of Mr. Newby, and sent in a bill for it; that twenty cents per car was a reasonable price for unloading cars.

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On cross-examination, he stated that the mill operated by defendant was a large plant at Greenville, Missouri, for sawing pine lumber only. That the plaintiff was employed by defendant to saw up some of its oak timber to fill orders received by the lumber company for that kind of lumber; that the oak business was good until about March, 1900, when certain members of the lumber company objected to the contract with plaintiff and witness was instructed by the officers to handle the oak business lighter.

He said that they could have gotten orders for more oak lumber by cutting better timber, but they were using their better grades of timber to make ties; that the company, through himself as agent, furnished such orders to plaintiff for oak as would result in satisfactory prices to the lumber company, but that if it had been left to him, he would have accepted some orders which were returned by his superior officers. He further stated that the company had sawed at plaintiff's mill and kept in stock a large amount of lumber and that it had such lumber on hand for which it did not have orders, before the lumber was sawed; that such lumber accumulated and that they did not look forward to the probable trade and accumulate it for the purpose of having it on hand to fill orders, but that the custom was to send orders to the plaintiff's mill as they were received by the lumber company; that the defendant had furnished plaintiff logs to saw, at times when they had no orders on hand for the sawed product; and that the lumber not disposed of remained piled for five or six months; that Mr. Klotz, the president of the company, objected to the manner in which it was piled and in July or August, 1900, a large amount of lumber, which had been piled, or stacked at plaintiff's mill, was taken from that mill and brought to defendant's mill yard at Greenville, and there re-stacked, on strips, in that yard; that the lumber that was left at plaintiff's mill remained there in piles when it was or-

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dered stacked on strips and this was done in January, 1901; that witness had it restacked because if it had remained longer, it was liable to be damaged.

William Cromer, a witness for plaintiff, testified that he had been in the lumber business for forty years and was familiar with the timber of southeast Missouri; that he had examined the lumber piled up at Greenville which had been sawed by plaintiff and said: "I don't think the lumber was good. Looked to be all of an inferior quality. It was a hard matter to determine what the quality of the logs were. There was a great deal of it rotten."

The evidence of Jeff Markham, an experienced lumber man, was to the same effect.

Defendant offered a demurrer at the close of plaintiff's evidence which the court overruled, whereupon defendant offered the following evidence:

W. L. Matthews testified that he had charge of the timber department of defendant lumber company at the time the contract was entered into between plaintiff and defendant; that he knew the character and kind of timber to be furnished plaintiff, was discussed with plaintiff; that the lands from which the timber was to be taken had been cut over for railroad ties prior to the establishment of plaintiff's mill; that the timber was an average grade and better than the timber lying east of St. Francis river.

Witness knew of the plaintiff burning some of defendant's lumber, which had been stacked, and heard Mr. Klotz tell plaintiff not to burn any more; that he, Klotz, wanted the lumber moved to the company's yards. He further testified that the lumber on hand which had not been sold was bad and poorly manufactured; that he got 30,000 feet of it for fencing purposes and most of it had to be retrimmed; that he also used 30,000 feet for bridge purposes on the railroad and that this had rotten ends, which had to be trimmed off; that

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the lumber left in the yards was not merchantable lumber.

On cross-examination, he stated that it was in January, 1901, that plaintiff burned the lumber and that Klotz objected to it and wanted it stopped; that the fire made a good big blaze; that the 30,000 feet which witness used for fencing purposes and which he had retrimmed, was charged to the "farm account" of the lumber company, at $11 per thousand.

W. A. Reed testified that he was bookkeeper for the defendant at one time and manager of the sales department at another time; he had supervision of the orders received from the traveling salesmen of defendant and he sent orders to plaintiff to be filled at his mill.

Witness also submitted a schedule, of the amount of lumber manufactured by plaintiff and of the amount sold for each month during the life of the contract, which showed that plaintiff had manufactured, all told, 2,753,673 feet of which 2,165,849 feet had been sold, leaving on hand 858,560 feet.

He further testified that there were many complaints from customers of the lumber company as to the manufacture of the oak lumber sawed at plaintiff's mill, and in consequence of such complaints, defendant was compelled to allow deductions in prices to the customers; that such reduction or rebate was made on nearly every car shipped.

Witness referred to a number of customers who complained and a number of letters from customers were read in evidence, most of which letters witness testified were sent to plaintiff.

Witness further stated that the 800,000 feet of excess lumber sawed by plaintiff and for which defendant could find no orders, was still in the lumber company's yard, and that most of it was not properly trimmed; that fifty per cent of the ends were not square, and some pieces had rotten ends; that if a piece of timber

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for sawing has a defect in it, it is the duty of the trimmer to cut off that end; that it makes a shorter piece of lumber, but a better piece; that the depreciation in price of oak lumber in defendant's yards at Greenville, on account of defects in manufacture, was about $5 per thousand, that he, witness, told the plaintiff they could not sell his lumber; that from May 1, 1900, to January 1, 1901, Mat Rhodes (plaintiff's brother) was in charge of the sales department of the defendant company, and during the time sold all the company possibly could; and that the utmost endeavors were made to sell and dispose of the oak lumber; that in January, 1901, Mr. Klotz came in as general manager, and he claimed the company was not getting enough for its oak; that about the middle of the winter and in January, 1901, they were not selling much oak, that Mr. Klotz had ordered the price higher and had said we must get what we could afford to sell it for, "I told Mr. Rhodes, the plaintiff, that we could not sell much more of his lumber, and the best thing he could do would be to get ready to move."

On cross-examination, witness said that he had been in the milling business for thirteen years and had had charge of the whole lumber business for defendant; that he had no experience in handling logs, had done no grading of lumber; that while at Grandin, Missouri, he had tried to learn all that he could about the lumber business.

Witness saw and copied the orders given plaintiff for grading. He said that a No. 1, common, board is a sound board with square edges, free from rot, that would stand a wind shake if it did not go through, and was one that could be used for ordinary building purposes; that a piece of board sixteen feet long, that had a wane about three feet and the wane not going half way across the edge of the piece would be admissible as No. 1; that the lumber ought to be free from knots.

He stated that the plaintiff could have manufac-

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tured the lumber better; that the reason why it had rotten ends was because the plaintiff did not cut the ends off; if he had had sound timber they would not have been rotten. Witness told Rhodes, the plaintiff, that the company would expect him to cut all he could off of a log that would go in on an order and cut the rest to the best advantage; that witness had offered to sell the lumber stacked in defendant's yards for $5.50 per thousand.

His attention was called to a clause in one of the letters offered in evidence, in which it was stated that they found the count all right, but the grade badly off, and his attention was also called to another letter where the customer had complained of the car of lumber as being rotten and unsalable and an offer made on the car at $18 per thousand. Witness stated that there was some oak lumber shipped, about 350,000 feet, which was cut at Johnson's mill; that there was also some objection to it, but it was not included in Rhodes' account; that all the oak lumber was shipped out in the name of the Holladay-Klotz Land & Lumber Company; that the plaintiff shipped none in his name; that the lumber company was not making a good profit on the oak, and Rhodes was not to blame for not filling orders when he had no logs, as the failure to suply logs was the fault of the lumber company.

J. H. Martin testified that he was the traveling salesman for defendant lumber company, traveling in Kansas, Nebraska and western Missouri; that the grade of oak lumber used in that territory was known as No. 1, common; that he had fifth or sixty customers to whom he sold oak lumber; that as salesman, he made the best possible effort to sell such lumber, and was selling what he understood was the output of plaintiff's mill; that up to March, 1901, he lost several customers who complained that the grade of lumber was inferior. About two-thirds of his customers complained of the

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manufacture of the lumber and said it was not sawed properly.

Witness found that in most instances the complaints were just, in many cases the lumber had waney edges and was doty. When these complaints came in, the witness would investigate by instructions of the lumber company and would have to make allowances for the defects. In one case he lost $15, in another case $11 on a car, and in another $30, and another $35. When he sold a customer a car of bad lumber he lost the customer and was not able to sell again to him. Witness named a number of firms who complained, among them, Mr. Price, Harrisonville, Missouri, Holton Lumber Company, Seneca, Kansas, Talmage Lumber Company, Talmage, Nebraska, Funnel Lumber Company, Lawrence, Kansas, and Layson Lumber Company, Maryville, Kansas.

On cross-examination witness stated that the party to whom the $35 allowance was made did not want the car at all, but was induced to take it. That sales of oak lumber during the years 1899 and 1900 were good and prices fair; that he had from time to time received letters from defendant requesting him to get orders for oak lumber, and that he did his best to get such orders; that he worked his territory diligently and got no more orders than he sent in; that in one instance he made a sale of select or clear lumber and it was something that the company could not have manufactured and was not accepted.

On redirect examination witness stated that he had made special effort to push the sale of oak lumber, and on further cross-examination stated that the lumber company got a good price for oak lumber, but that the eight cars mentioned by him were not all the complaints received; that such complaints were general; that witness did not have his order book with him and could not give them more in detail.

J. M. Wilson testified that he was also a traveling

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salesman for defendant lumber company, taking a part of Missouri and southern Kansas; that there was a good demand for oak lumber known as No. 1, common; that witness had thirty or forty customers; that some of the lumber sold by him for defendant came up to this grade and some did not; that he had some complaints on account of the grades and investigated them, and advised the lumber company to allow them as the oak lumber was irregularly sawed. He said he had one or two compliments on the lumber from parties who said it was well manufactured. Witness used his best endeavors to sell but at the end of his two years work the trade was not as good as it previously had been. The demand was good but there were complaints as to the manufacture and quality of the stock; that the timber from which oak lumber is manufactured may be good but if it is not properly sawed it does not come up to the grade known as No. 1, common.

The lumber company urged witness to get all the orders he could and he had letters from them to that effect. The territory in which he worked was good for the sale of oak, as it had no oak supply of its own.

On cross-examination witness stated that he could not say, without his order book, how much he sold, nor remember the number of complaints received on account of bad manufacture. He recalled six or eight parties and gave the names and the particulars of their complaints; such complaints being chiefly that the lumber was badly manufactured. In nearly every case of such complaint the customer refused to buy any more lumber from witness. He sold two cars to a man named Taylor which were not filled by the lumber company on account of the price. At a lumber convention in Kansas City, in January, 1901, a special effort was made by him to place oak lumber on the market, and he sold three cars during that convention. He continued his efforts until the oak mill of Mr. Rhodes was closed

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down. He sold some lumber after this convention, but he could not tell how much without his order book.

G. S. Weber testified that he was city inspector of lumber in St. Louis, Missouri, and had been for twenty years and was familiar with grades of hard wood lumber. He inspected the piles of oak lumber in defendant's yards at Greenville, Missouri, during May, 1902; inspected all of it. He found some of the lumber thicker at one end than the other. This indicated bad sawing. The lumber was not properly edged, and had more wane than was allowable, generally speaking it was rough lumber and the defects were those of manufacture and were such as to depreciate the grade of the lumber about 55 per cent; that there were about 500,000 feet of it.

On cross-examination he stated that in his business as an inspector he neither bought nor sold lumber, but was appointed by the lumberman's exchange of the city to inspect lumber; that he got his orders for such inspection, usually from the secretary of the exchange; that he had worked over all the lumber yards in St. Louis, and did not see any lumber known as No. 1 common in the pile at Greenville, Missouri; that Mr. Klotz asked him after he had come to Greenville to look at this lumber and some of it was rotten.

Weber's evidence was corroborated by A. Newby, George Wheeler, Mat Kelly, Phillip Sternfells, W. E. Steuwe, William Foley, William Carter and Frank Hackworth, all experienced lumber men.

Eli Klotz testified that he was president of the Holladay-Klotz Land & Lumber Company; that Rainwater preceded him as president, that so far he knew the company had at all times used reasonable efforts to sell the output of Mr. Rhodes' mill; that during the entire time he had been manager in the office, orders had been procured for that mill; that they had men on the road for the purpose of selling oak lumber and efforts were made to get orders from the salesmen; that

from the time he took charge of the company's business in January, 1901, there was a falling off in the trade for oak lumber; and also a falling off in the price; that lumber sold for less in February than they got for it in January. He stated that the timber was worth $1.50 per thousand, hauling logs from the woods to the railroad about $3.50, loading them on the cars 50 cents, and bringing them in $1 per thousand; that the company paid Mr. Rhodes $3 a thousand to manufacture them, making $10; that during the entire part of the term of the contract with plaintiff, the lumber netted the company from $9 to $9.60 per thousand; that he knew the character of the logs furnished plaintiff's mill and it was good material; that Mr. Rhodes, plaintiff, told witness that the logs furnished him were too good for the material they were used for and that No. 1 material was furnished him and ought to be put into wagon material. This was in February, 1901; that about the first of January he went out on horseback near plaintiff's mill and found that plaintiff was burning some of the company's lumber stacked there; that he told plaintiff that he had burned over 100,000 feet and that plaintiff said it was not over 60,000 feet; that lumber at that time was selling at $11 per thousand; that the company always furnished Mr. Rhodes such orders as it received; that in the month of February witness had an order for switch ties at twenty-five cents, and after they were shipped they only netted the company $9.60 and at that time they could get a few more orders. Witness told plaintiff that if he was willing to take less to manufacture them, they could get him more orders for ties, and he said he wouldn't do it; that defendant continued to furnish him with logs right along after that during the entire term of the contract; that lumber that had accumulated and for which defendant had no orders, amounted to 800,000 feet; that it was not trimmed right, nor sawed even; that it would have to be retrimmed to make merchant-

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able lumber; that the company had tried to sell this lumber and witness had offered it to Mr. Rhodes for $6.50 per thousand and was willing to sell to him still at that price. Witness knew of complaints as to character of lumber shipped, and that they came frequently. He also stated that he made an objection to the way the lumber was stacked while at the yards of plaintiff's mill and he had it loaded on the cars and brought down to the company's yards and restacked it there; that the way it had been piled by plaintiff also depreciated it in value by making it doty or dry rot.

On cross-examination witness stated that he took charge of the company's business January 17, 1901, and that the contract with plaintiff was in force after that time until the fifteenth of July, 1901; that the lumber company had never attempted to avoid the contract, but that it had used due diligence to furnish plaintiff's mill with good logs; that they had two traveling salesmen and also the St. Louis office and also took orders for lumber at the office in Greenville; orders covered the States of Nebraska, Kansas and Missouri; that the logs furnished plaintiff's mill were good and that plaintiff said the timber furnished him was good; that railroad ties are made out of No. 1 timber and plaintiff made some railroad ties; that the orders for ties spoken of by Mr. Rhodes in February were for the M. K. & T. Railroad Company.

He stated that good logs are not rotten, but they may have wind shakes in them; that the lumber burned by plaintiff (about 80,000 feet) ought to be worth $10 per thousand; that when the lumber company was furnishing logs to its own mill, plaintiff's mill might have been idle if the lumber company had no orders for oak, but that the company always gave plaintiff logs as soon as they got orders for lumber. Witness stated that he turned down orders frequently because the price was not satisfactory. Asked what the lumber on hand was



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worth, he said the company would take $6.50 per thousand for it.

This was all the testimony on the part of defendant.

Plaintiff was then recalled, and referring to a memorandum book, which he had, stated that he cut on February 16, 1901, 11,503 feet on a ten hours' run at his mill; that his usual run was eleven hours; that he cut on the eighteenth, 13,079 feet, on the twentieth and twenty-first he had no logs, and on the next day cut 7,753 feet. Plaintiff said he had examined lumber in defendant's yards and was unable to state how much of it was waney. He said he spoke to Klotz about their cutting better timber for ties than they did to make good lumber out of, and that this was for the M. K. & T. Railway Company; that he used 60,000 or 80,000 feet in making ties; that the logs furnished to make the ties were much better logs than those brought in ordinarily; that about one-half of the lumber in the yards would rate as No. 2, common; that the accumulation of this lumber was on account of sawing into stock lumber that could not be used on orders; that he told Mr. Klotz that he burned about 60,000 feet.

At the conclusion of the testimony the following occurred as shown by the bill of exceptions:

"The plaintiff now asks the court to put the jury in charge of the sheriff and permit the jury to look at this lumber.

"By the Court: 'I will not do this unless there has been an agreement. I am not going to send them down there and have an exception made here to it.'

"The defendant made this proposition: That they would let the jury go by themselves and look at the lumber.

"The plaintiff made this proposition. That they would pick a man and the defendant would pick a man to go with the jury.

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"This is agreed to and the defendant chose Mr. W. L. Matthews, the plaintiff selects Mr. Rhodes.

"Says the court to the jury: 'I will let you go down there and look at that lumber that was sawed by the plaintiff in this case. I desire to instruct you not to discuss this case at all, not to comment whatever on what you find down there, just observe it quietly and, on the other hand, the gentlemen who are accompanying you are instructed not to talk to you about the defects of this lumber, and these instructions must not be disobeyed in the least by either of you.'

"The jury proceeds to the lumber yard.

"This was all the evidence in the case.

"And thereupon the defendant requested the court to give the following instruction:

" 'The court instructs the jury that under the pleadings and all the evidence offered in the case, plaintiff is not entitled to recover as to the first cause of action stated in the petition, and as to the first cause of action your verdict must be for the defendant.' "

The court refused the above instruction and over the objection of defendant gave the following instructions for plaintiff:

"1. The court instructs the jury, that by the contract sued on and offered in evidence, defendant agreed to furnish plaintiff with logs out of which merchantable lumber could be manufactured, sufficient in number to run his mill daily, barring the ordinary hindrance incident to the business, unless you should find that defendant, after honestly trying to sell the output of the plaintiff's mill at market price, could not do so, then plaintiff should only expect and receive logs enough to supply the market furnished by the defendant, it continuing, however, to make the same honest effort to sell; but if you should find that defendant furnished an inferior quality of logs, which plaintiff manufactured in a workmanlike manner and handled according to the contract and orders of defendant, and that the

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lumber so produced, or much of it, was unsalable because made of bad and unsuitable timber, then your verdict should be for the plaintiff, for the reason that such unsalable lumber was occasioned by the fault of the defendant.

"2. If you find for the plaintiff on the first count in the petition, which relates to the contract sued on, you will assess his damages at not to exceed four thousand, two hundred and ninety-eight dollars and seventy cents, as you may consider from the evidence he sustained by reason of defendant's failure to comply with the terms of its contract with him, as construed in the first instruction.

"3. The court instructs you that if you find from the evidence that plaintiff unloaded four hundred and twenty-three cars of logs for defendant at his mill, and that he was employed by defendant to do the work, then you will return a verdict for him in such sum as you consider the work reasonably worth, not to exceed twenty cents per car, or eighty-four dollars and sixty cents. This instruction relates to the second count of plaintiff's petition, and you will return a separate verdict concerning it."

The court also gave one on the credibility of the witnesses which was not objected to.

For defendant the court gave the following instructions:

"4. The court instructs the jury that the plaintiff in the first cause of action stated in his petition claims damages only because of the alleged failure of defendant to furnish him with a sufficient quantity of logs to enable his mill to be run all the time during the term of the contract and you can not allow plaintiff any damages on account of the defective character of logs furnished by defendant (if you find from the evidence the logs were defective) but the evidence as to the kind of logs furnished should be considered by you in determining defendant's counterclaim for damages, on

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account of the alleged improper sawing or manufacturing of the logs into lumber.

"5. The court further instructs the jury that if you find from the evidence that about the first of January, 1901, the plaintiff set fire to and burned any lumber belonging to defendant, which had been sawed by plaintiff, then you will allow defendant as damages on its second counterclaim, such sum as you may find to be the reasonable value of the lumber so burned and destroyed.

"7. The jury are further instructed that under the contract read in evidence, the defendant was only required to furnish logs to plaintiff's mill in such numbers or quantity as suited the reasonable convenience of defendant and to make deliveries of such logs in accordance with the sales of lumber, which it might with reasonable effort and diligence be able to make from time to time, and if you find from the evidence that it furnished more logs than it could with reasonable effort have disposed of when sawed into lumber, and that notwithstanding such effort to sell a large amount of lumber accumulated on its hands, for which it has found no market, then you will find the issues for defendant, as to the first cause of action in plaintiff's petition.

"8. The court instructs the jury that the burden of proof is upon the plaintiff to establish to your satisfaction by a preponderance (or greater weight of the evidence) his case as stated in the petition, and unless you find that it has been so established, you will find for defendant as to the cause of action stated in plaintiff's petition.

"The court further instructs the jury that if you find from the evidence that the plaintiff failed to saw or manufacture the logs furnished by defendant to him in a workmanlike manner or failed to saw it smooth and even, or failed to stack it in a workmanlike manner so as to protect it from decay or injury, and that in

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consequence of such failures on plaintiff's part a large amount of lumber was sawed by plaintiff for which defendant could find no sale, or that it was piled by plaintiff in such a manner that it was exposed to the weather and became decayed or injured, and that several hundred feet was left upon defendant's hands in a damaged or injured condition, and that this resulted from the negligence of the plaintiff, then you will allow defendant as damages, in his first counterclaim such sum as you may find to be the depreciation in value of the said lumber, not exceeding $3,200.

The court refused the following instruction asked by defendant:

"The court instructs the jury that under the written contract read in evidence, the defendant was only required to furnish and supply oak saw logs delivered at plaintiff's mill in numbers limited by the reasonable convenience of said defendant, and to make such sales of said oak lumber as it was able to make from time to time, and that the defendant therefore, had the right to furnish such supplies of logs as it deemed proper, and you cannot find a verdict for the plaintiff as to the first cause of action stated in plaintiff's petition unless you find from the evidence that defendant willfully or intentionally refused to supply logs for plaintiff's use."

The jury returned the following verdict:

"We, the jury, find the issues for the plaintiff on the first cause of action stated and assess his damages at the sum of $1,500, one thousand five hundred dollars, and we find the issues for the plaintiff on the second cause of action stated and assess his damages at the sum of $84.60, eighty-four and 60-100 dollars.

"We, the jury find the issues for the plaintiff on the first counterclaim of defendant.

"And we further find the issues for the defendant on the second counterclaim and assess his damages at the sum of three hundred dollars (300)."

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A timely motion for new trial being of no avail, defendant appealed.

BLAND, P. J. (after stating the facts as above).—1. Plaintiff offered evidence in chief tending to prove that the defective and unsalable condition of the 800,000 feet of lumber resulted from the unsound and defective logs, furnished him by defendant, out of which the lumber was sawed. This character of evidence was objected to by defendant on the ground that there was no averment in the petition that there were any defects in the timber.

The answer alleged that the defects in the lumber left over was in manufacturing of it by defendant.

The reply tacitly admitted that the lumber was defective. To avoid the force of this admission, it is alleged that the defects were to be ascribed to the rotten and defective character of the timber furnished by the defendant out of which it was sawed. In this condition of the pleadings, we think, that it was not only proper, but that the burden was on plaintiff to prove to the reasonable satisfaction of the jury that the defective and unmerchantable quality of the lumber was the fault of the defendant, in furnishing rotten or doty timber, and that the court properly admitted testimony in chief to locate the responsibility for the defective lumber.

2. It is contended by defendant that the defendant, under the contract, was constituted the judge as to the quality of the timber to be supplied plaintiff for manufacturing lumber, and when prices for lumber were satisfactory, and that it is only liable for an intentional violation of the contract.

The language of the contract, in respect to furnishing logs, is, "The said party of the first part further agrees to furnish and supply oak saw logs, delivered at Skidway at said mill, in numbers to be limited by the reasonable convenience of the said party of the

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first part, and make such deliveries by the sales of such oak lumber that the said party of the first part may be able to make from time to time. It being understood that the said party of the first part will endeavor to supply logs sufficient to enable said sawmill of the party of the second part to run all the time and cut such lumber as said party of the first part can sell each month; said party of the first part agrees to log said mill to its capacity to cut, limited only by the amount of lumber said party of the first part shall be able to sell at satisfactory prices."

The purpose of the parties was to manufacture and sell marketable lumber. To furnish saw logs for this purpose would require such logs as could be converted into merchantable lumber. The quality of the logs was, therefore, not left to the whim, or caprice of the defendant, but it was obliged to furnish saw logs from which the plaintiff could saw merchantable lumber.

What is meant by the phrase, "satisfactory price," in the contract should receive a reasonable construction; a price should be construed satisfactory which would yield the defendant a reasonable profit over and above the gross cost of the lumber to it, plus the reasonable value of the timber and the cost of making sales of the lumber.

A fair construction of the contract would require the defendant to furnish timber from which could be manufactured salable lumber, to make reasonable efforts to put sound and salable lumber on the market and, if by such effort sales at reasonable profits could be made, to keep plaintiff's mill continuously running, plaintiff was obliged to furnish sufficient saw logs to keep it going. On the other hand, plaintiff was obliged, when furnished with sound timber, to saw it in a workmanlike manner and of such dimensions as required by the defendant.

The instructions given substantially adopted this

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view of the contract and we think fairly submitted the issues to the jury.

The evidence was conflicting and much of it is contradictory, but that plaintiff made out a prima facie case, we have no doubt and he was entitled to have his theory of the case submitted to the jury on the evidence adduced by him.

With the weight of the evidence, we are not concerned; to weigh it and to make proper deductions therefrom was the peculiar and exclusive province of the jury.

The refused instruction asked by the defendant put a construction on the contract opposed to the views herein expressed and we think was properly refused by the trial court.

3. The first instruction for plaintiff authorized a recovery, if defendant did not sell lumber for the reason that it made no honest effort to do so and, second, if it failed to sell lumber because it furnished an inferior and defective quality of logs. The second breach of the contract is not alleged in the petition. For this reason it is contended by defendant that plaintiff was allowed to recover upon a cause of action not alleged in the petition.

As an excuse for not selling lumber, the answer set up that it was badly manufactured. The reply denied that the lumber was badly sawed, but tacitly admitted that much of it was unsalable and alleged as a reason for its unmerchantable quality, that the logs furnished by defendant and the timber from which it was sawed was doty and rotten. This allegation of the reply shifted the responsibility for the unmerchantable lumber from plaintiff to defendant. It also contains an allegation of a breach of the contract not alleged in the petition, to-wit, the furnishing of doty or rotten logs by defendant from which merchantable lumber could not be sawed. It does not contradict any of the allegations of the petition, nor is it inconsistent with the

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petition, nor nowhere evinces a purpose on the part of the pleader to abandon the breach of the contract alleged in the petition as constituting plaintiff's cause of action. It could not, therefore, be stricken out on the ground that it was a departure from the petition. Cravens v. Gillilan, 73 Mo. l. c. 528; Chemical Co. v. Lackawanna Line, 70 Mo. App. 274. Nor does it contain redundant matter, but contains new matter not inconsistent with the petition, constituing a defense to the counterclaim set up in the answer and was therefore allowable under section 607, Revised Statutes 1899. Coombs Com. Co . v. Block, 130 Mo. 668. But the reply was not confined at the trial to the legitimate functions of a reply, but was used, as is shown by instructions numbers 1 and 2 given for the plaintiff, in aid of the petition by authorizing a recovery for a breach of contract in furnishing of rotten or doty logs by the defendant. Under the statute (sec. 607, supra) the office of a reply is to put in issue new matter alleged in the answer by a general or special denial thereof, and the pleader may allege in the reply any "new matter, not inconsistent with the petition, constituting a defense to the new matter in the answer." But a reply can not be used in aid of the petition by introducing for the first time a new cause of action or an additional cause of action, nor to engraft on the petition a material allegation omitted therefrom. McMahill v. Jenkins, 69 Mo. App. l. c. 281; Crawford v. Spencer, 36 Mo. App. 78; Pattison on Missouri Pleading, secs. 676, 763, 880. And it was error to instruct the jury, as was done in the first instruction given for the plaintiff, that the furnishing of defective logs by defendant was a breach of the contract entitling plaintiff to recover.

4. The second instruction for plaintiff, in respect to the measure of damages, is also erroneous. The measure of damages in actions for breach of contract is a matter of law for the court to declare in its instructions to the jury, not a matter for the jury to guess at

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or speculate upon. 1 Sedgwick on Damages (8 Ed.), sec. 31; Morrison v. Yancey, 23 Mo. App. 670; Williams v. Iron Company, 30 Mo. App. 662; Wilburn v. Railway, 36 Mo. App. 203; Flynt v. Railway, 38 Mo. App. 94. Compensation for the actual loss resulting from the breach is what the law aims to give. Albers v. Merchants' Exchange, 138 Mo. 140; Chalice v. Witte, 81 Mo. App. 84. The compensation on the first count of the petition would be plaintiff's loss of the net profits he would have realized from the operation of his mill if he had been supplied with saw logs according to the terms of the contract. American Pub. & Engr. Co. v. Walker, 87 Mo. App. 503. For the errors herein noted the judgment is reversed and the cause remanded. *Reyburn* and *Goode, JJ.*, concur.

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PERKINS, Appellant, v. MASON, Respondent.

**St. Louis Court of Appeals, March 1, 1904.**

1. **APPEAL: Affidavit.** An affidavit for appeal which, though awkwardly and inartistically drawn, substantially fills the requirements of the statute is sufficient.

2. **WASTE: Injunction: Possession.** An injunction will not lie to prevent waste upon land, of which the record shows neither title nor possession in plaintiff.

Appeal from Greene Circuit Court.—*Hon. H. C. Neville*, Judge.

AFFIRMED.

*J. A. Moon* for appellant.

*O. T. Hamlin* for respondent.

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BLAND, P. J.—Omitting caption, the petition is as follows:

"Now this day comes plaintiff, James A. Perkins, by his attorney, J. A. Moon, and represents to the court: That there is now pending on appeal in the Supreme Court of Missouri, a certain suit wherein Val Mason is plaintiff and James A. Perkins is defendant, both of whom are the same parties above mentioned, the said suit having been appealed from the Greene county circuit court by the said James A. Perkins.

"That the said suit, so pending, involves the right, title and interest of these said parties, Mason and Perkins, to the east half of the northeast quarter of section 29, township 30, range 20, in Greene county, Missouri. That at the commencement of said suit and during all times thereafter and now, said Perkins was, has been and is now, in possession of said tract of land. That the judgment and decree of the said circuit court in said case, in favor of said Mason and against said Perkins, did not give the possession of said tract of land to said Mason, and said Mason has never been in possession of said tract of land. That said land is the property of plaintiff—Perkins. That there is a lot of valuable timber on said tract of land. That to cut the said timber would materially and greatly depreciate the value of the land, and said land is worth but little with the timber taken off, as compared with its present value, and taking off the timber would be an irreparable injury. That said Mason, with his agents, employees and servants have entered upon said land and are now cutting off the timber—and have already cut and corded up a large quantity of wood, and are threatening to haul the said wood off the land and appropriate it to their own use. That said Mason and agents are insolvent and damages can not be recovered by suit at law, therefore, plaintiff Perkins asks that a temporary injunction be issued restraining said defendant,

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Val Mason, his agents and employees, and party or parties claiming under him, from cutting timber or trespassing upon said property, and that they be enjoined from removing any portion of said timber now cut down and severed from said land—and that upon final hearing said injunction may be made perpetual, and for all other relief pertaining to equity and justice, as the court deems proper and just."

On notice to defendant, a temporary injunction was granted by the circuit court of Greene county at the September term, 1902, and afterwards, but at the same term, the defendant filed his answer, which was a general denial of the allegations of the petition. At a still later day of the same term, the issues were submitted to the court who, after hearing the evidence, dissolved the temporary injunction and dismissed plaintiff's bill at his cost. A timely motion for new trial was filed which the court overruled and the plaintiff appealed.

Defendant calls in question the sufficiency of the affidavit for an appeal. The affidavit was made by plaintiff's attorney and, omitting caption, read as follows:

"James A. Moon, attorney for the plaintiff, James A. Perkins, in the above entitled cause, being sworn upon his oath says, that the appeal prayed for by his plaintiff is not made for vexation or delay, but because he considers himself, plaintiff, aggrieved by the judgment and decision of the court.

"JAMES A. MOON,
"Attorney for Plaintiff."

"Subscribed and sworn to before me this first day of October, 1902.

"J. M. YARBROUGH, Clerk,
"By S. A. REED, D. C."

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The affidavit is awkwardly and inartistically drawn but it substantially fills the requirements of the statute and we think is sufficient.

Leave was given plaintiff, up to and including the first day of the next regular term of the circuit court, to file bill of exceptions. The bill purports to be signed on January 12, 1903, and recites that it was the first judicial day of the January term, 1903, and the record shows that it was filed on that day.

If the proceedings and judgment in the case of Mason v. Perkins, mentioned in the petition, were offered in evidence, they were omitted from the bill of exceptions. In this state of the record, there is nothing to show what interest, if any, Perkins has in the lands. W. H. Davidson testified that he had rented the lands of Perkins and went into possession of the premises under him, but subsequently, before this suit was commenced, he had attorned to Hamlin or to Hamlin and Mason and was in possession under them at the time of the trial. The record before us, shows Perkins seeking to enjoin the defendant from committing waste on lands which he (Perkins) is not in possession of and to which he has no title, therefore, he failed to make out his case.

The judgment is affirmed. *Reyburn* and *Goode, JJ.*, concur.

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# STATE OF MISSOURI, Respondent, v. RUNZI et al., Appellants.

**St. Louis Court of Appeals, March 1, 1904.**

1. **INFORMATION: Verification: Motion to Quash.** An information not supported by affidavit, as required by section 2477, Revised Statutes of 1899, will be held bad on a motion to quash.

2. ———: ———: **Objection Can Not be Made on Appeal.** But such an affidavit forms no part of the information itself, and the omission of it, if objection is not taken by timely and specific motion, will be considered waived; the objection can not be made for the first time, after judgment, by motion in arrest, or on appeal in the court of appeals. (Overruling State v. Connor, 58 Mo. App. 457 and State v. Sayman, 61 Mo. App. 244.)

3. **OPTION DEALING: Information.** An information under section 2339, Revised Statutes of 1899, which charges that defendants kept an office, store or place "wherein was conducted, and. permitted, the pretended buying and selling of shares of stocks and bonds, etc.," was fatally deficient in that it failed to allege who permitted the buying and selling or that defendants had knowledge of the unlawful acts.

4. **INFORMATION: Language of Statute.** An information in the language of the statute creating the offense, sought to be charged, is sufficient where the statute so far individuates the offense that the defendant has proper notice, by its terms, of the offense for which he is to be tried.

5. ———: ———: **Option Dealing: Exhibiting Quotations.** An information under section 2338, Revised Statutes of 1899, charging, in the language of that statute, that defendants permitted the exhibition and display upon a blackboard the quotations of the price of stocks, etc., and locating the offense in the proper county, is sufficient, and need not more particularly describe the place nor allege who saw the exhibition.

6. ———: ———: ———: ———: **Each Day's Exhibit a Separate Offense.** Where the offense is charged in several counts, as committed on successive days, it will not be treated as one count charging continuing offense, but each day's exhibition of quotations was a separate offense.

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Appeal from Montgomery Circuit Court.—*Hon. E. M. Hughes,* Judge.

AFFIRMED IN PART, AND REVERSED IN PART.

*Chester H. Krum* and *J. D. Barnett,* for appellants.

(1) The information is fatally defective, because not verified by the oath of the prosecuting attorney, or some other person, or supported by the affidavit of such person. R. S. 1899, sec. 2477; State v. O'Connor, 58 Mo. App. 457; State v. Cayman, 61 Mo. App. 244; State v. Pruett, Id. 156; State v. Bragg, 63 Mo. App. 22; State v. Bonner, — Mo. —. Counts two to ten, inclusive, do not state offenses. R. S. 1899, sec. 2338. (2) If the case is remanded, the court should direct the trial court to treat counts two to ten, inclusive, not as stating separate offenses, but as covering one transaction.

*Barclay & Fauntleroy,* for respondent.

(1) It is too late to raise first in this court the objection that no proper verification or collateral support (by affidavit of a third party under section 2478, Laws 1901, p. 139) appeared in the circuit court. Lambert v. People, 29 Mich. 71; State v. Osborn, 54 Kansas 473; Alexander v. Hayden, 2 Mo. 212; Houston's Admr. v. Thompson's Admr., 87 Mo. App. 68; Naylor v. Chinn, 82 Mo. App. 160; Furrow v. Chapin, 13 Kansas 107; Chidsey v. Powell, 91 Mo. 622. (2) Even if the record showed (and we claim that it does not) a total want of such verification or support, the defect would be, at worst, an irregularity. State v. Chadwick, 10 Oregon 423. (3) Some of the cases above cited indicate that such a defect is not jurisdictional. The information would have been amendable

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if the objection now assigned had been made in season. State v. Broeder, 90 Mo. App. 167; Kincheloe v. Gorman's Admrs., 29 Mo. 422. (4) The omission of a verification does not affect the "substantial rights of the defendant upon the merits," and is cured by the healing process prescribed for such cases by the statutory Doctor Jeofails. R. S. 1899, secs. 2535, 2481; State v. Patton, 94 Mo. App. 32 (67 S. W. 970); State v. Craig, 79 Mo. App. 416; State v. Bonnie, 85 Mo. App. 462; State v. Fleming, 90 Mo. App. 241. (5) (a) Verification by the prosecuting attorney is not absolutely demanded by the statute; he may base his information "upon the affidavit filed of a private citizen, either with the clerk in vacation or with the prosecuting attorney" (to quote the words of the second division of the Supreme Court). R. S. 1899, sec. 4277; State v. Gregory (Sup. Ct., Mo., Nov. 17, 1902), 76 S. W. 970; State v. Bonner, 77 S. W. 463; State v. Hicks, Sup. Ct. unreported. Such an affidavit is not a part of the record proper. (b) Its presence or absence can only be shown on appeal by bill of exceptions, and here the record is entirely silent on that point. It is a general rule of practice that an omission to verify a pleading must be made the ground of timely and specific objection or the omission is considered waived. B. & P. R. Co. v. Church, 91 U. S. 127; State v. Duncan, 116 Mo. 288; State v. Smith, 114 Mo. 423; Mercantile Co. v. Burrell, 66 Mo. App. 117; Huntington v. House, 22 Mo. 365; Chidsey v. Powell, 91 Mo. 622; Ruch v. Jones, 33 Mo. 394; Kelly v. Thuey, 143 Mo. 422. (6) Even a recital of the filing of the affidavit is not part of the record proper, and could only become so by bill of exceptions. Phillips v. Jones, 75 S. W. 920. (7) And if there was such a recital or the record is silent on that point the matter would be equally foreclosed from review. State to use v. Mason, 31 Mo. App. 211; State v. Reed, 154 Mo. 122. (8) The information, as



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a pleading, is not required by law to disclose on its face whether it is founded on such an affidavit of a third party, or on facts verified by the prosecuting officer himself. State v. Ransberger, 106 Mo. 135; State v. Morse, 55 Mo. App. 332. (9) Verification by the prosecuting attorney and, yet more, a collateral affidavit are matters "not necessary to be proved," and therefore (even if viewed as parts of the information) the want of either is not reversible error by reason of the express terms of the statute of jeofails in criminal cases concerning matters not necessary to be proved. State v. McCoy, 162 Mo. 388.

BLAND, P. J.—The first count of the information is as follows:

"State of Missouri, county of Montgomery, ss.

"In the circuit court, at city of Montgomery, May term, 1903.

"State of Missouri, plaintiff, v. Donovan Commission Company, a corporation, Phillip McDermott, president of said corporation, C. E. Hayden, business manager of said corporation, and Charles Runzi and P. B. Burch, agents and employees of said corporation, defendants.

"First count.

"A. W. Lafferty, prosecuting attorney in and for Montgomery county, Missouri, under his oath of office, informs the court that defendants, the Donovan Commission Company, a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, Phillip McDermott, president of the said Donovan Commission Company, C. E. Hayden, business manager of said Donovan Commission Company, and Charles Runzi and P. B. Burch, agents and employees of said Donovan Commission Company, on the twenty-first day of March, 1903, at and in the county of Montgomery, in the State of Missouri, did then and there,

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unlawfully and willfully keep and cause to be kept, an office, store or place, wherein was conducted, and permitted, the pretended buying and selling of shares of stocks and bonds, of corporations, petroleum, provisions, cotton, grain and agricultural products, on margins, and otherwise, without any intention of receiving and paying for the property so bought, or of delivering the property so sold, and wherein was conducted, and permitted, the pretended buying and selling of shares of stocks and bonds of corporations, petroleum, provisions, cotton, grain and agricultural products, on margins, when the parties selling the same, or offering to sell the same, did not intend to have the full amount of such property on hand or under their control, to deliver upon such sales, and when the parties buying such property or offering to buy the same, did not intend actually to receive the same, if purchased; against the peace and dignity of the State."

The second count is as follows:

"A. W. Lafferty, prosecuting attorney in and for Montgomery county, in the State of Missouri, under his oath of office, further informs the court that defendants, the Donovan Commission Company, a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, Phillip McDermott, president of said Donovan Commission Company, C. E. Hayden, business manager of said Donovan Commission Company and Charles Runzi and P. B. Burch, agents and employees of said Donovan Commission Company, on the twentieth day of March, 1903, at and in the county of Montgomery, in State of Missouri, did then and there unlawfully and willfully, permit the communication, reception, exhibition and display upon a blackboard in a certain room by defendants then and there kept and maintained, statements and quotations of prices of shares of stocks and bonds of corporations, petroleum, provisions, cotton, grain and agricultural products, with a view to the purchase and sale, and the

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pretended purchase and sale, and the making of contracts and agreements for the purchase and sale, by themselves and other persons frequenting said room so kept and maintained by defendants, of shares of stocks and bonds of corporations, petroleum, provisions, cotton, grain and agricultural products, on margins and otherwise, without any intention on the part of themselves or such other persons, of receiving and paying for the property so bought, or of delivering the property so sold, and with a view to the buying and selling. and the pretended buying and selling, by themselves and other persons frequenting said room so kept and maintained by defendants, of shares of stock and bonds of corporations, petroleum, provisions, cotton, grain and agricultural products, on margins, and on optional delivery, without any intention on the part of themselves or such other persons, of having the full amount of property so sold, and offering to be sold, on hand or under their control to deliver upon such sales, and without intending actually to receive the full amount of such property, if purchased; against the peace and dignity of the State.''

There were eight other counts like the second, except as to dates, covering the following dates: February 4, 5, 13, 16, 18 and 20, and March 19 and 24, 1903. There were five additional counts, but as they were dismissed at the close of the State's evidence, it is not necessary to notice them here. The cause was dismissed as to C. E. Hayden before the trial commenced and as to the Donovan Commission Company and McDermott at the close of the State's evidence. The issues on the first to the tenth counts inclusive were submitted to the jury who, after hearing the evidence and receiving the instructions of the court, returned the following verdict:

''We, the jury, find the defendants guilty under the second count of the information and we assess their punishment at a fine of three hundred dollars each.

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"And we further find the defendants guilty under the third count of the information and we assess their punishment at a fine of three hundred dollars each.

"And we further find the defendants guilty under the fourth count of the information and we assess their punishment at a fine of three hundred dollars each.

"And we further find the defendants guilty under the fifth count of the information, and we assess their punishment at a fine of three hundred dollars each.

"And we further find the defendants guilty under the sixth count of the information, and we assess their punishment at a fine of three hundred dollars each.

"And we further find the defendants guilty under the seventh count in the information and we assess their punishment at a fine of three hundred dollars each.

"And we further find the defendants guilty under the eighth count of the information and we assess their punishment at a fine of three hundred dollars each.

"And we further find the defendants guilty under the ninth count of the information and we assess their punishment at a fine of three hundred dollars each.

"And we further find the defendants guilty under the tenth count of the information, and we assess their punishment at a fine of three hundred dollars each.

"And we further find the defendants guilty under the first count of the information, and we assess their punishment at a fine of five hundred dollars each.

"(Signed) W. W. Daniels, Foreman."

After unavailing motions for new trial and in arrest of judgment, defendants Runzi and Burch appealed to this court.

1. The information was not verified by the oath of the prosecuting attorney or by the oath of a person competent to testify, nor was it supported by the affidavit of a person competent to testify, as required by section 2477, R. S. 1899. The objection to the information, that it was not verified by affidavit, was not raised in the trial court by motion to quash, nor was it raised

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by the motion in arrest of judgment; it is raised for the first time here. It would serve no useful purpose at this time to review and restate the divergent views expressed by our appellate courts in respect to the nature and definition of a criminal information under our State Constitution. I think it is settled by abundant authority that the legislature of the State has the constitutional right to regulate the procedure by information in criminal cases and to prescribe a procedure different from that of the common law, and hence has authority to require that informations shall be verified by the affidavits of the prosecuting attorney or by the affidavit of some person competent to testify as a witness in the case. State v. Bonner, 77 S. W. (Mo. Supreme Court) 463; State v. O'Connor, 58 Mo. App. 457; State v. Sayman, 61 Mo. App. 244; State v. Bragg, 63 Mo. App. 22; State v. Hicks, Division 2, Mo. Supreme Court, (not yet reported).

There are two decisions of this court, to-wit: State v. O'Connor, and State v. Sayman, supra, which hold that verification of an information by affidavit is essential to its validity. In State v. O'Connor, the sufficiency of the information was raised after conviction, by motion in arrest of judgment; in State v. Sayman, it was raised for the first time on appeal to this court. It seems to me that this court, in State v. O'Connor, and State v. Sayman, had an incorrect and erroneous conception of the purpose and scope of section 2477, supra. The affidavit in support of an information, I do not think, is any more a part and parcel of the information than is the evidence taken by a grand jury upon which they find an indictment, a part and parcel of the indictment. If an information is not supported by the requisite verification, the defect does not affect the form or substance of the information but is only a departure from the statutory requirement, that it be verified before it is filed, and for this reason is open to attack by a motion to quash, just as is an indictment open

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to a like attack if presented by a grand jury who heard no evidence upon which to base it. State v. Grady, 12 Mo. App. 361; s. c. 84 Mo. 220; State v. Cole, 145 Mo. 672. But it was never imagined that after conviction on an indictment the defendant, by a motion in arrest or otherwise, could go behind the indictment for the purpose of setting aside the conviction, and show that the indictment had been found by the grand jury without hearing any evidence. Section 2515, R. S. 1899, prohibits the finding of an indictment for certain enumerated offenses, unless the name of the prosecuting witness is indorsed thereon as prosecutor. If an indictment falling within the provisions of this section, is presented without the name of the prosecutor indorsed thereon, it may, on motion, be quashed. State v. Joiner, 19 Mo. 224. But no lawyer would contend for a moment that after conviction, the judgment could be arrested for the reason the name of the prosecutor was not indorsed on the back of the indictment as required by the statute. Section 2510, R. S. 1899, requires that every indictment returned by a grand jury shall be certified by the foreman to be a true bill by making the following indorsement thereon: "A true bill. A. B., foreman."

In State v. Mertens, 14 Mo. 94, it was held that the certificate and signature of the foreman was not an essential part of the indictment, and it was too late after conviction on an unindorsed indictment for the defendant to raise the objection by motion in arrest of judgment. Substantially the same ruling was made in State v. Burgess, 24 Mo. 381; State v. Harris, 73 Mo. 287; State v. Hays, 78 Mo. 600. The statute, section 2477, supra, it seems to me, is one regulating the procedure in prosecutions of crime by information, that its purpose is to prevent ill-advised, hasty and improvident action on the part of a prosecuting attorney, by requiring that before he may file an information he must have it verified by the oath of a competent witness or make

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such inquiry into the facts constituting the alleged crime as will enable him to verify the information himself before he files it, thus requiring some evidence of the commission of the crime before the formal charge is filed. If this view of the statute is the correct one, then it is clear that the affidavit forms no part of the information, adds nothing to it, and is not essential to its validity, but is simply a statutory regulation of the practice in respect to its filing, hence if the verification is omitted, like the omission of the indorsement of a true bill on the back of an indictment by the foreman of the grand jury, the indorsement of the name of the prosecuting witness, in certain cases, as prosecutor, or the failure to indorse the name of the principal witness for the State on the back of the indictment, the omission will furnish good grounds for quashing the information, but will furnish no ground for arrest of judgment after conviction and can not be raised for the first time on appeal in the appellate court. If the verification is omitted, the omission comes under the general rule of pleading, to-wit, if the objection is not made the ground of a timely and specific motion, the omission will be considered as waived. Paddock v. Somes, 102 Mo. 226; Seckinger v. Mfg. Co., 129 Mo. 590; Malone v. Fidelity & Casualty Co., 71 Mo. App. 1. This rule was observed in State v. Osborne, 54 Kan. 473, where the objection to the verification of a criminal information was not pointed out by motion to quash, and it was held that the action of defendant in pleading to the merits and going to trial, operated as a waiver to the defect, and in support cited State v. Otey, 7 Kan. 69; State v. Ruth, 21 Kan. 583. The same ruling was made in a civil case by the Oregon Supreme Court in State v. Chadwick and Brown, 10 Oregon 423. It seems to me that this is the correct view and that State v. O'Connor and State v. Sayman, supra, in so far as they hold that the affidavit is an essential part of the information, should be, and are, overruled.

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2. It is contended that the first count of the information does not state any offense, that it is merely the language of the statute, that it is not stated who permitted the prohibited acts to be done, that the persons who took part in the prohibited trading are not named and that the appellants are not alleged to have had knowledge of the act alleged to have been done. This count alleges that the defendants kept and caused to be kept an office, store or place "wherein was conducted, and permitted, the pretended buying and selling of shares of stocks and bonds," etc. The section of the statutes (section 2339, R. S. 1899) on which this count is bottomed is as follows:

"It shall be unlawful for any corporation, association, copartnership or person to keep or cause to be kept in this State, any office, store or other place wherein is conducted or permitted the pretended buying or selling of the shares of stocks or bonds of any corporation, . . . and the keeping of all such places is hereby prohibited; and any person, company, copartnership or corporation, or officer or agent thereof, that shall be guilty of violating this section, shall, upon conviction thereof, be fined in a sum not less than five hundred dollars nor more than five thousand dollars."

The offense, under this statute, consists not in the pretended buying or selling of shares of stock, etc., but in the keeping of an office, store or place wherein is conducted or permitted to be conducted the pretended buying and selling of shares of stock, etc. To bring them within the provisions of this section, the defendants must have themselves kept or caused to be kept by another, a place where they conducted or knowingly permitted to be conducted by some one else, the pretended buying and selling of shares of stock, etc. The information does not charge that the defendants conducted or knowingly permitted some one else to conduct the pretended buying and selling of shares of stock, etc., but leaves it to conjecture as to who conducted the pro-

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hibited buying and selling, or whether or not defendants knew that the prohibited trading was going on. The inference might be drawn from what is alleged, that defendants either conducted or knowingly permitted some one else to conduct the pretended buying and selling, etc., at a place kept by them; but inferences are not allowable to supply allegations in a criminal pleading, on the contrary, the rule is, that in every criminal charge, whether by indictment or information, it is essential that all the facts and circumstances comprised in the definition of the offense be affirmatively stated with clearness and certainty. State v. Gabriel, 88 Mo. 631; 1 Archbold's Criminal Practice, star page 88.

Generally, it is sufficient to charge a statutory crime in the language of the statute creating the offense, but this is only true when the statute so far individuates the offense that the defendant has proper notice from the mere adoption of the statutory terms what offense he is to be tried for (Wharton's Criminal Pleading & Practice (9 Ed.), sec. 220); or, as Bishop says, "It must state the facts whence the result comes; thus notifying the defendant what he must meet and putting upon the record a proper case for the court's adjudication." 1 Bishop's New Criminal Procedure, section 627. In Mears v. Commonwealth, 2 Grant (Pa.) 385, the inference was made that what was not charged in the indictment did not exist. In State v. Broeder, 90 Mo. App. 156, it is said: "An information must bring the accused strictly and certainly within the terms of the offense described in the statutes, and should leave nothing to conjecture or inference." See also on this point, State v. Kirby, 115 Mo. 440; State v. Ruthven, 19 Mo. 383; State v. Morrison, 64 Mo. App. 507; State v. Baskett, 52 Mo. App. 389; State v. Clevenger, 20 Mo. App. 626.

The defendants may have kept or caused to be kept an office, store or place in Montgomery county, and in

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that office, store or place may have been conducted the pretended buying and selling of the capital stock of corporations, etc., without their knowledge or consent. It is not the mere keeping of the office or place where pretended buying and selling is conducted that constitutes the offense under the statute, but the keeping of such place and the conducting or knowingly permitting to be conducted the pretended buying and selling, etc., that constitutes the offense; without knowledge that the prohibited trading was going on, guilt can not be imputed to the keeper of a place wherein it is conducted. The first count, in my opinion, is fatally deficient in that it fails by proper allegations to connect the defendants directly with the act of conducting the buying and selling, or of knowingly permitting the pretended buying and selling to be conducted at a place kept by them in Montgomery county, and for this reason the motion in arrest of judgment on the first count should have been sustained.

3. Counts two to ten inclusive are bottomed on section 2338, R. S. 1899, which is as follows:

"It shall not be necessary, in order to commit the offense defined in the preceding section, that both buyer and seller shall agree to do any of the acts above prohibited, but the said offense shall be complete against any corporation, association, copartnership or person thus pretending or offering to sell, or thus pretending or offering to buy, whether the offer to sell or buy is accepted or not; and any corporation, association, copartnership or person, or agent thereof, who shall communicate, receive, exhibit or display in any manner any such offer to buy or sell, or any statements or quotations of the prices of any such property, with a view to any such transaction as aforesaid, shall, for each such offense, be deemed and held to be an accessory thereto, and upon conviction thereof, shall be fined the same as the principal; and any such corporation, association, copartnership or person or agent permitting any such

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communication, reception, exhibit or display shall, for every such offense, be fined a sum not less than three hundred dollars nor more than two thousand dollars."

(The offense defined in the preceding section referred to is what is commonly known as option dealing.)

It is insisted by appellants that these counts state no offense. They are stated in the language of the statute, and the statute fully individuates the offense; when this is so, the indictment or information is sufficient. State v. Mitchell, 6 Mo. 147; State v. Davis, 70 Mo. 467; State v. Johnson, 93 Mo. 317; State v. Adams, 108 Mo. 208.

It was sufficient to locate the exhibit or display mentioned in the statute in Montgomery county. The pleader was not required to describe the town lot, acre of ground, or particular building where the exhibit was made, nor was he required to name the person or persons to whom the exhibit was made, or the persons who actually saw the exhibition. The exhibition was, according to the information, made to the public. This is sufficient. It was made to be seen by the public and it was wholly immaterial who actually saw it, or who was induced thereby to violate the preceding section by dealing in options by means of the exhibit.

4. We are not impressed by the contention of appellants that counts two to ten inclusive should be treated as one count, for the reason the exhibit was a continuous one. The transactions or exhibitions were, according to the evidence, continuous in the sense that the exhibitions were given daily from day to day. But each exhibition was a violation of the statute and each day's exhibit constituted a separate offense. The evidence is clear and convincing that the appellants made the illegal exhibits as charged in these nine counts and at the times therein charged, and shows that they did a large business for a country town. In six weeks their deals amounted to over one hundred and thirty-six thousand dollars. One farmer bought at one time sixty-

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five thousand dollars worth of railroad stock on option. There is, therefore, no room to doubt the guilt of the appellants. The case was carefully tried, elaborately instructed and ably defended. No error intervened on the trial that would justify us in setting aside the verdict on the second, third, fourth, fifth, sixth, seventh, eighth, ninth or tenth counts; as to all of these counts the judgment is affirmed. For the reasons hereinbefore stated, the judgment on the first count is reversed. *Reyburn* and *Goode, JJ.*, concur.

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## STATE OF MISSOURI, Respondent, v. McANALLY, Appellant.

**St. Louis Court of Appeals, March 1, 1904.**

1. **DRUGGIST: Selling Liquor Without Prescription: Date.** In an indictment against the proprietor of a drug store and a pharmacist for selling intoxicating liquor in less quantities than four gallons without a prescription from a physician, it is not necessary to state the date of such sale when the name of the purchaser is given.

2. ———: **Suffering Liquor to be Drunk on Premises: Name.** In an indictment against a druggist for suffering liquor to be drunk on his premises, under section 3051, Revised Statutes of 1899, it is not necessary to name the person who was permitted to drink the liquor.

3. ———: ———. On the trial of a druggist for suffering liquor to be drunk on his premises, an instruction which required the jury to find the defendant "did unlawfully suffer and knowingly permitted Andrew Stickler to drink, etc.," is fully sufficient to meet the requirement of the statute, section 3051, Revised Statutes of 1899, under which the indictment is framed.

4. **INDICTMENT.** Where, on the trial under an indictment in three counts, the defendant was found guilty on two of the counts, the failure to make any finding on the remaining count, there being no evidence to sustain it, was equivalent to an acquittal on such remaining count.

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Appeal from Bollinger Circuit Court.—*Hon. Jas. D. Fox,* Judge.

AFFIRMED.

*W. M. Morgan* and *W. H.* and *Davis Biggs* for appellant.

(1) The first count of the indictment is bad, because it fails to give the date of the alleged illegal sale to Andrew Stickler. State v. Martin, 108 Mo. 117; State v. Manning, 87 Mo. App. 78; State v. Major, 81 Mo. App. 289; State v. Wilcoxen, 38 Mo. 370; State v. Strumbo, 26 Mo. 306; State v. Quinn, 40 Mo. App. 627; State v. Harris, 47 Mo. App. 558; R. S. 1899, sec. 2535. (2) The second count of the indictment is fatally defective for the reasons, first, it fails to aver the day on which the alleged offense was committed; and second, it fails to give the name of the person alleged to have drunk the intoxicating liquor. (3) The second instruction given by the court is erroneous, in that it failed to require the jury to find that the defendant assented to the drinking of the liquor on his premises.

*Charles G. Revelle* for respondent.

(1) Where an indictment discloses that the alleged offense was committed within the statutory period of limitation, and where time is not of the essence of the offense the specific date on which the offense was committed is immaterial and need not be alleged. In failing to specify the particular date on which the illegal sale was made the first count of the indictment is not defective. R. S. 1899, p. 672, sec. 2535; 1 Bishop Criminal Practice (3 Ed.), chap. 24; p. and sec. 400; 2 Wharton Criminal Law (9 Ed.), chap. 24, p and sec. 1521; State v. Stumbo, 26 Mo. 306; State v. Small, 31

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Mo. 197; State v. Wilcoxen, 38 Mo. 370; State v. Findley, 77 Mo. 338; State v. Hughes, 82 Mo. 86; State v. Barr, 30 Mo. App. 498; State v. Pratt, 98 Mo. 482; State v. Effinger, 44 Mo. App. 81; State v. Hutchinson, 111 Mo. 257; State v. Carnahan, 63 Mo. App. 244; State v. Young, 70 Mo. App. 52; State v. Bradford, 79 Mo. App. 346; State v. Lantz, 90 Mo. App. 15. (2) The failure to allege the specific time of the commission of the offense and the name of the person who drank the intoxicating liquor does not invalidate the second count of the indictment, time not being of the essence of the offense and the name of the person being immaterial. R. S. 1899, p. 770, sec. 3051; State v. Gibson, 61 Mo. App. 368; State v. Wingfield, 115 Mo. 428; State v. Bailey, 73 Mo. App. 576; State v. Finney, decided by Supreme Court on the 9th day of December, 1903, not yet reported. (3) The case of State of Missouri v. Martin, 108 Mo. 117, cited by appellant and upon which appellant apparently relies, has been in effect overruled. State v. Quinn, 94 Mo. App. 59; State v. Quinn, 170 Mo. 176. (4) Section 3051 of the Revised Statutes 1899, is directed against all druggists and those legally acting in that capacity and prohibits all as such from suffering intoxicating liquor to be drunk at or about their place of business and the fact that one person may occupy a dual position and engage in some other business or profession in addition to that of a druggist does in no manner change or alter the character or effect of the section. State v. Maurer, 96 Mo. App. 347; R. S. 1899, secs. 3036-3037. Session Acts 1901, p. 143, secs. 1-3037. (5) The second instruction given by the court was a proper and correct declaration of the law applicable to the case.

BLAND, P. J.—At the March term, 1902, of the Bollinger circuit court the grand jury returned the following indictment against the defendant.

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"The grand jurors for the State of Missouri, now here in court, duly impanelled, charged and sworn to inquire within and for the body of the county of Bollinger and State of Missouri, upon their oath present and charge that one, S. M. McAnally, late of the county and State aforesaid, on or about the —— day of ———, in the year 1902, at and in the county of Bollinger, and State aforesaid, being then and there a druggist and proprietor of a drug store and a pharmacist, did then and there unlawfully and willfully sell and dispose of certain intoxicating liquor in less quantity than four gallons, to-wit, one pint of whiskey, one pint of wine, one pint of beer, one pint of brandy to Andrew Stickler and divers others, whose names are to these jurors unknown, and that said intoxicating liquor was not then and there sold and disposed of on a written prescription dated and signed, first had and obtained from any regularly registered and practicing physician, stating the name of the person for whom the same was prescribed, and that said intoxicating liquor was prescribed as a necessary remedy, and that said intoxicating liquor was not then and there sold for art, mechanical or scientific purposes on a written application signed by a person known to the said S. M. McAnally to be a mechanic; scientist or artist; the said S. M. McAnally not then and there having dramshop license nor any other legal authority to sell and dispose of said intoxicating liquor as aforesaid; and said intoxicating liquor not having been manufactured on the premises, and not being then and there sold and disposed of for sacramental purposes, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State.

"And the grand jurors aforesaid, upon their oath aforesaid, further present and charge that one, S. M. McAnally, late of the county and State aforesaid, on or about the ——— day of ———, in the year 1902, at and in the county of Bollinger, and State of Missouri, being

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then and there a druggist and a dealer in drugs and medicines, did then and there willfully and unlawfully suffer and knowingly permit certain intoxicating liquor, to-wit, one pint of whiskey, one pint of wine, one pint of beer, one pint of brandy, to be drunk at and about his place of business, to-wit, his drug store, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State.

"And the grand jurors aforesaid, upon their oath aforesaid, further present and charge that one, S. M. McAnally, late of the county and State aforesaid, on or about the ——— day of ———, in the year 1902, at and in the county of Bollinger, and State of Missouri, aforesaid, being then and there a merchant, and having a merchant's license for dealing in goods, wares and merchandise, did then and there willfully and unlawfully sell and dispose of certain spiritous, vinous and fermented liquors in less quantity than five gallons, to-wit, one pint of whiskey, one pint of wine, one pint of beer, one pint of brandy, to be drunk at his store and place of business and did then and there suffer the same to be drunk at his store and place of business, he, the said S. M. McAnally, then and there not having a dramshop keeper's license, or any other legal authority therefor, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State."

The defendant moved to quash the indictment on the following grounds:

"1. Because it appears from the face of the indictment that at the time of the alleged offense this defendant was a druggist, a proprietor of a drug store, a pharmacist, and a dealer in drugs and medicines and could only be indicted for the illegal sale of liquor as a druggist, and not as a merchant.

"2. Because it appears from the face of the indictment that at the time of the alleged offense the de-



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fendant was a druggist, a proprietor of a drug store, a pharmacist, and a dealer in drugs and medicines and no date is stated when any of the alleged offenses were committed.

"3. Because the indictment does not state facts sufficient to constitute any offense against the law of this State.

"4. Because it appears from the face of the indictment that at the time of the alleged offenses the defendant was a merchant and a dealer in goods, wares and merchandise, and had a license for dealing in goods, wares and merchandise, and could only be indicted for the illegal sale of liquor as a merchant, and not as a druggist."

The motion was overruled and a trial was had resulting in a verdict of guilty on the first and second counts of the indictment. A motion for new trial proving of no avail defendant appealed.

The evidence offered by the State tends to prove that defendant was the proprietor of a drug store in Bollinger county, and within a year next before the filing of the indictment he sold to Andrew Stickler, without a prescription, two drinks of whiskey supplied from his stock in the drug store, and that Stickler and one Fred Buckner drank the whiskey behind the prescription case in the store, in the presence of the defendant, and defendant made no objection to its being drunk at his place of business. Defendant offered evidence tending to show that he was both a registered pharmacist and a regular practicing physician; that at the time the liquor was sold to Stickler he had in his employ, Martin Rhodes, as a clerk and helper in his drug store, and that the whiskey was sold by Rhodes to Stickler. Defendant testified that he was not at the store on the day Stickler testified he purchased and drunk the whiskey, and that his instructions to Rhodes, his clerk, was not to sell liquor to any body except upon a regular prescription signed by a practicing physician.

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Of its own motion, the court gave the following instruction for the jury:

"1. You are instructed that if you believe and find from the evidence in this cause that the defendant, S. M. McAnally, in the county of Bollinger, in the State of Missouri, at any time within one year prior to March 15, 1902, did unlawfully sell to Andrew Stickler one pint, or any other quantity of whiskey, and shall further find that said defendant at the time of said sale was a druggist and proprietor of a drug store, and a pharmacist, and made such sale of whiskey to Andrew Stickler, without having first obtained a written prescription from some regularly registered and practicing physician, stating the name of the person for whom the same was prescribed, and that said whiskey was prescribed as a necessary remedy, you will find the defendant guilty as he stands charged in the first count of the indictment, and so finding, will assess his punishment at a fine not less than one hundred nor more than five hundred dollars.

"2. If you believe and find from the evidence in this cause that the defendant, S. M. McAnally, in the county of Bollinger, in the State of Missouri, at any time within one year prior to March 15, 1902, was a druggist and a dealer in drugs and medicines, and did unlawfully suffer and knowingly permit Andrew Stickler to drink whiskey at and about his place of business, that is to say, his drug store, you will find the defendant guilty, as he stands charged in the second count of the indictment, and assess his punishment at a fine not exceeding two hundred dollars, or at imprisonment in the county jail not exceeding six months.

"3. The defendant in this cause is a competent witness in his own behalf under the laws in this State; but in determining his credibility and the weight to be attached to his testimony, you may take into consideration the fact that he is the defendant testifying in his

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own behalf and his interest in the result of his prosecution.

"4. The defendant in this cause is presumed to be innocent of the charges preferred against him, and this presumption of innocence follows and protects him through every step of this prosecution until his guilt is established by the State beyond a reasonable doubt and if after a fair, full and impartial consideration of all the testimony in this cause, you entertain a reasonable doubt of the defendant's guilt, you should acquit him; but to authorize an acquittal on that ground alone, you should have a reasonable and substantial doubt touching his guilt, and not the bare possibility of his innocence.

"5. If you believe and find from the evidence that one, Martin Rhodes, was acting as clerk in the drug store of the defendant, S. M. McAnally, and sold the whiskey to Andrew Stickler, without defendant's knowledge or consent, and that defendant had instructed said Rhodes not to sell intoxicating liquor to any one, without a prescription from some regularly registered and practicing physician, and that said Rhodes sold the whiskey to said Stickler in violation of defendant's instructions, then, and in that case, you should acquit the defendant as charged in first count of the indictment.

"6. You are further instructed that unless the defendant was present at the time it is charged that Andrew Stickler drank the whiskey in his drug store, and did not authorize, or knowingly permit Stickler to drink said whiskey in his drug store, then you should acquit the defendant of the charge in the second count of the indictment."

1. Defendant contends that the first count of the indictment is bad for the reason that it fails to give the date of the sale; and cites State v. Martin, 108 Mo. 117, as supporting this contention. In the Martin case the information was held bad for the reason the person to whom the liquor was sold was not named. The court held in that case that as the defendant might justify the

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sale by producing the prescription of a physician authorizing the particular sale, it was his right to be notified by the information to whom the alleged sale was made to afford him an opportunity to hunt out the prescription, if he had one, from his files and produce it at the trial as evidence in his defense. It seems to us that when the name of the purchaser is given, the defendant is sufficiently informed of the particulars of the charge to enable him to prepare his defense, if he relies upon a prescription as a defense. If he has more than one prescription issued to the alleged purchaser, it would work no hardship on him to bring them all to court and then offer in evidence such of them as he might desire. Time is not of the essence of the offense and it is competent for the State on the trial to prove a sale to the person named in the indictment or information at any time within a year next before the filing of the indictment or information; hence, if the date of the sale should be alleged, the State will not be confined to that particular date in its proof but might prove a sale at any time within the statutory period of limitation. State v. Carahan, 63 Mo. App. 244; State v. Young, 70 Mo. App. 52; State v. Bradford, 79 Mo. App. 346; State v. Lantz, 90 Mo. App. 15. To state that a sale was made on a particular date would not, therefore, inform the defendant that the State would rely on a sale made on the date alleged and hence would furnish him no certain information as to the date of the sale. For these reasons we think the indictment was not defective in failing to allege the date of sale.

2. It has been repeatedly held that in an indictment for selling liquor without license, it is not necessary to name the persons to whom the liquor was sold. State v. Ladd, 15 Mo. 430; State v. Fanning, 38 Mo. 359; State v. Rogers, 39 Mo. 431; State v. Wingfield, 115 Mo. 428; State v. Gibson, 61 Mo. App. 368. By analogy this ruling is applicable to an indictment for suffering liquors to be drunk at the place of business of

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a druggist, and we do not think the second count of the indictment was faulty for failing to name the person who was permitted to drink liquor in defendant's drug store.

3. The second instruction given by the court is not open to the objection made by defendant, that it failed to require the jury to find that defendant assented to the drinking of the whiskey at his place of business. The instruction required the jury to find that the defendant "did unlawfully suffer and knowingly permit Andrew Stickler to drink," etc. The statute, (R. S. 1899, sec. 3051) on which the second count is predicated, declares it a misdemeanor for any druggist or proprietor of a drug store to "suffer alcohol, . . . to be drunk at or about his place of business." The instruction required more than does the statute in this particular, and is more open to criticism on this account than it is to the objection raised by the defendant.

There was no evidence tending to prove the third count of the indictment and it was practically abandoned at the trial. The jury made no finding on this count. In these circumstances the verdict of the jury finding the defendant guilty on the first and second counts and its failure to make any finding on the third count amounted to an acquittal on the third count, so all the issues of facts on all three counts of the indictment were disposed of by the verdict. State v. Maurer, 96 Mo. App. 347; State v. Whitton, 68 Mo. 91.

There being no reversible error in the record the judgment is affirmed. *Reyburn* and *Goode, JJ.*, concur.

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## MEREDITH, Appellant, v. HOLMES, Respondent.

**St. Louis Court of Appeals, March 1, 1904.**

1. **EQUITY: Reforming Contract: Burden of Proof: Evidence.** One who seeks in equity to reform a written contract on the ground of mistake, has the burden of overthrowing, by evidence which is clear and convincing, the *prima facie* presumption that the contract expresses the agreement of the parties.

2. ———: ———: **Sufficiency of Evidence.** In an action to reform a written instrument on the ground of mutual mistake, and incorporate an additional stipulation by parol, the evidence is examined and held adequate to support a judgment for defendant.

Appeal from St. Louis City Circuit Court.—*Hon. H. D. Wood*, Judge.

AFFIRMED.

*Klein & Hough* and *Andrew M. Sullivan* for appellant.

(1) As to the grounds upon which a court of equity will reform a written contract sought to be reformed for mistake. 1 Story, Eq. Jur., sec. 152; Leitensdorfer v. Delphy, 15 Mo. 166; Bispham's Eq. Prin., sec. 190; Cassidy v. Metcalf, 66 Mo. 119; Craighead v. Tierney, 100 Mo. 276; Buggy Co. v. Woodson, 59 Mo. App. 550; Henderson v. Beasley, 137 Mo. 199. (2) As to the evidence required to prove a mistake, so as to warrant the reformation of an instrument. Leitensdorfer v. Delphy, supra; Able v. Ins. Co., 26 Mo. 59; Madsell v. Riddle, 82 Mo. 31; Fanning v. Doan, 139 Mo. 392. (3) If mistake is admitted, or clearly established, preponderance of evidence may be sufficient to show what the contract was intended actually to cover. Bunse v. Agee, 47 Mo. 270.

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*Reynolds, Koehler, Reiss & Harlan* for respondent.

(1) Before appellant is entitled to the relief prayed for he must show that there was a mistake, and that it was a mutual one between the parties, by testimony so clear and convincing that there is no doubt left in the mind of the chancellor. There must be a certainty of the mistake and that it was mutual; a preponderance of testimony in its favor is not sufficient Forrester v. Scoville, 51 Mo. 268; Parker v. Van Hoozer, 142 Mo. 621; Downing v. McHugh, 3 Mo. App. 594; Bartlett v. Brown, 121 Mo. 353; Steinberg v. Ins. Co., 49 Mo. App. 255; Sweet v. Owens, 109 Mo. 1; Clark v. St. Louis Transfer Co., 127 Mo. 255; Robertson v. Bobb, 139 Mo. 346; Bobb v. Bobb, 7 Mo. App. 501. (2) Plaintiff's action in retaining the contract for sixteen months without intimation that a mistake had been made, during which time the situation of the parties had changed and the property securing the notes sold, is not only wholly inconsistent with his plea that there was a mistake, but his acquiescence constitutes such laches as will bar a recovery. American Ins. Co. v. Neiberger, 74 Mo. 167; Murdock v. Lewis, 26 Mo. App. 234; Reel v. Ewing, 4 Mo. App. 569.

STATEMENT.

The petition is in two counts; the first is to reform a written contract on the ground of mutual mistake; the second is to recover on the contract after its reformation. Without reformation, the second count states no cause of action. The contract as executed is as follows:

"I, Dr. C. A. Meredith, agree to dispose of my Star Carriage Mfg. Co.'s stock, par value $2000, and notes due from said company amounting to not less than $1600, for the following considerations, viz:

"That J. S. Holmes shall deliver to me within

thirty days a $20,000 policy of life insurance issued by the Metropolitan Life Insurance Company, known as a fifteen-year endowment gold bond, that said J. S. Holmes shall deliver to me said policy, together with a receipt for $1497.40 as first year's premium, also that J. S. Holmes shall give to Dr. Meredith two notes (without interest) one for $350 to be paid September 27, 1899, and one for $1250, to be paid one year from date of above policy.

"It is understood and agreed that no obligation exists by virtue of this agreement unless said Metropolitan Life Insurance Company issues the above described policy, and unless Dr. Meredith can deliver the stock and notes as above described.

"It is also understood and agreed that said J. S. Holmes assumes all responsibility for the stock and notes belonging to Dr. Meredith after the transfer is legally effected, and all other financial obligations to the Star Carriage Manufacturing Co. up to this date, said assumption to take effect on the delivery of the above described policy and the handing over to J. S. Holmes of the stock and notes above described.

"Approved, J. S. HOLMES. C. A. MEREDITH."

The petition asks that the last clause of the contract be reformed so as to read as follows: "It is also understood and agreed that said J. S. Holmes assumes all responsibility for the stock and notes belonging to Dr. Meredith after the transfer is legally effected, and all other financial obligations of C. A. Meredith for or on account of the Star Carriage Manufacturing Company up to this date, said assumption to take effect on the delivery of the above described policy and the handing over to J. S. Holmes of the stock and note above described."

The evidence shows that the Star Carriage Manufacturing Company was a corporation operating a plant for manufacturing and repairing carriages, in the city of St. Louis, and owned some city lots upon

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which it had a shed. The par value of the capital stock of the corporation was one hundred dollars. The plaintiff, in July, 1899, owned twenty shares, the defendant twenty-five shares of the stock. Plaintiff, defendant, H. M. Pierce and Otto C. Schaefer constituted the board of directors. The corporation owed plaintiff over sixteen hundred dollars for money he had advanced it. It also owed the Franklin Bank a note of four thousand dollars, indorsed by plaintiff, Pierce and Schaefer, and secured by a deed of trust upon its real estate shown to be worth from four thousand to forty-five hundred dollars. It also owed a note of three hundred dollars to Mrs. Lang, wife of the secretary of the company, indorsed by plaintiff and defendant. The annual statement of the previous year's business of the company, made June 30, 1899, showed that the company had made no money, and the plaintiff became dissatisfied with its management and was desirous of disposing of his stock and withdrawing from the company. With a view of getting out of the concern, he approached defendant and made him a proposition to sell out to him. Holmes suggested to plaintiff that he take a fifteen or twenty year five per cent gold bond policy for twenty thousand dollars in the Metropolitan Life Insurance Company of New York of which company Holmes was manager.

On July 30th plaintiff made the following proposition by letter to defendant:

"July 30th, 1899.

"John Holmes, Esq.,
"City.

"Mr. Friend Holmes:

"I have examined your prospectus of the $20,000 fifteen year gold bond endowment policy, and as you suggest I will make you the following proposition. I will transfer, or cause to be transferred, to you all my stock, $2000, all my papers against the company, and

about $1700 for the following consideration: You to give me above mentioned policy, with the receipt for the first year's premium, $1250 note for one year, $350 in cash, and one new storm buggy 'A' grade, you to assume responsibility for the stocks and papers and all my responsibility relative to the company. If accepted I feel as though it will be rather expensive to me, but I am thoroughly disgusted with the present management and do not care to be a party to a change, would rather know that I am entirely out. Please let me know your pleasure in the matter to-morrow.

"Respectfully,

"C. A. MEREDITH."

The defendant replied as follows:

"St. Louis, Mo., July 31, 1899.

"My Dear Doctor:—Sorry I could not see you today. I leave to-night for St. Joe and expect to be back Wednesday a. m. May be able to make some arrangement with you altho' I can not accept your proposition. With kindest regards, I remain,

"Very sincerely yours,

"J. S. HOLMES."

A few days after this, plaintiff called at defendant's office and the terms of the contract were discussed, resulting in a request from defendant that plaintiff write out a memorandum of what he wanted, whereupon plaintiff, as he testified, wrote out the following memorandum in pencil:

"I have this day sold to Mr. J. S. Holmes all my stock, notes and accounts in and against the Star Carriage Manufacturing Company for $20,000, fifteen pay gold bond policy, paid for one year, $1250, six per cent note, payable before second premium falls due, $350 within 40 days, and one new storm buggy finished and completed; to be relieved from all obligations relative to Star Company."

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Plaintiff testified that after he wrote out this memorandum, the defendant then wrote out the contract in detail. His testimony is as follows:

"Q. Then, Mr. Holmes wrote up a paper in pencil or pen and ink? A. Yes, sir.

"Q. And he told the stenographer to make a copy? A. Yes, sir.

"Q. And then did the stenographer bring back this paper? A. Yes, sir, and a copy.

"Q. A duplicate of it? A. A duplicate of it.

"Q. Now, when he first brought it did it have everything on it that is there now, or was there something added to it? A. Our names were added, nothing else.

"Q. Well, now at what time did you call his attention to the fact that it did not include the assumption of your liabilities? A. Well, in writing the contract, when it came down to that last clause, 'It is also understood and agreed that said John S. Holmes assumes all responsibility for the stock and notes belonging to Dr. Meredith after the transfer is legally effected,' I suggested to him at this juncture that—

"Q. Well, now, wait a minute. Now he had written that in the paper, had he? A. Yes, sir, and I suggested to him at this juncture that it did not cover my indorsements and he says, 'and all other financial obligations to the Star Carriage Manufacturing Company.'

"Q. And did he write that down? A. Yes, sir, he wrote it down.

"Q. On that paper? A. On that paper.

"Q. And then the stenographer produced this paper did he? A. Yes, sir.

"Q. Now then, when the stenographer brought this paper what was done? A. Mr. Holmes read aloud one of them and then we signed them.

"Q. That is, you signed them and he marked them 'approved' and signed his name. A. Yes, sir;

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we compared them one with the other to see if it was all right.

"By the Court. Now let me understand that.

"Q. After this pencil memorandum had been made by you of what the terms of the contract were to be, then the paper marked Exhibit No. 3 was handed to the stenographer? A. No; no, sir.

"Q. Oh, Mr. Holmes then sat down and wrote up another memorandum, did he? A. Well, he wrote it out in detail, you know, that is, just the subject that was to be contained in it.

"Q. He wrote it as to the form of the contract, did he? A. Yes, sir.

"Q. And approved of the contract? A. Yes, sir.

"Q. Did he have your memorandum before him when he wrote that out? A. Just the pencil statement.

"Q. How did he write it out—did he write it out in ink? or with a pencil? A. He wrote it out in pencil or in ink, I disremember as to which, your Honor.

"Q. Well, that was handed to the stenographer, was it? A. The stenographer wrote it, yes, sir.

"Q. By Judge Klein: But before he handed it to the stenographer you called his attention to the fact that it did not include the matter of you indorsement? A. When he was writing it, yes, sir.

"Q. And then you added that to his memorandum that he was writing? A. Yes, sir; 'and all other financial obligations to the Star Carriage Manufacturing Company.'

"Q. And after this was done he handed his paper to the stenographer and the stenographer wrote it off on the typewriter? A. Well, there is another clause there after that relative to the date of it and the handing over to Mr. Holmes of the stock and notes and him handing over the papers to me—in other words, that it should not have any effect unless—

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"Q. Unless you got the gold bond from the life insurance company and delivered your stock to him? A. Yes, sir.

"Q. Now, Dr. Meredith, at the time when this paper was signed by you what, if anything, did you owe to the Star Carriage Manufacturing Company? A. I owed nothing to the Star Carriage Manufacturing Company.

"Q. Did the Star Carriage Manufacturing Company owe anything to you? A. Yes, sir; they owed me sixteen or seventeen hundred dollars. . . .

"A. No one was present when the contract was drawn except an agent came in occasionally into the office while he was writing the contract, and Mr. Current came in at that time. He was a clerk for Mr. Holmes.

"Q. By the Court: Did you stay there until the agreement was typewritten? A. I did.

"Q. Did you read it after it was typewritten? A. Mr. Holmes read it aloud.

"Q. Well, didn't you have it in your hands? A. I had one copy in my hands and Mr. Holmes had the other copy in his hands.

"Q. He read it out loud? A. Yes, sir.

"Q. By Mr. Harlan: You followed him with your copy? A. I followed him, yes, sir.

"Q. By the Court: Did you make exceptions at the time or corrections after it was typewritten? A. I did not.

"Q. By Mr. Harlan: When you handed this memorandum to Mr. Holmes, Ex. 3, it was after that that he wrote the contract? A. Yes, sir. I was present all the time and saw him write out the contract, and then it was sent to the stenographer. Two copies were made on the typewriter. I waited until it was finished. I held one copy in my hand as Mr. Holmes read out the other and no suggestion was made of any change and both parties signed it."

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Plaintiff testified that the note of the company to the Franklin bank, on which he was an indorser, was not mentioned at the time the contract was made, but that defendant, being a director in the corporation, knew of the existence of the note and knew that he had indorsed it and that some months previous he had mentioned to the defendant the fact, that he and Pierce had paid interest on the note, and that nothing whatever was said about this note when the contract was entered into. Plaintiff testified that he thought the capital stock of the company was worth its par value at the time the contract was made.

The evidence shows that both plaintiff and defendant fully complied with the contract on their respective parts as it is written. The four thousand dollar note was not paid and the deed of trust given to secure it was foreclosed. Plaintiff, being the highest and best bidder at the trustee's sale, got the city lots of the corporation for twenty-five hundred dollars. After paying the expenses of the sale and interest notes that were due, the balance of $1,433.50 was applied to the credit of the principal of the note. Plaintiff has since paid the balance of the note. After the sale under the deed of trust, the carriage company went into the hands of a receiver or trustee who was able to pay about twenty per cent of its liabilities from its assets. The defendant paid the Lang note but never called upon the plaintiff for contribution.

The defendant testified that he did not write out the contract; that it was written out by the plaintiff and then copied on a typewriter, and that the typewritten copy followed the original as written by the plaintiff; that nothing was said about his assuming the four thousand dollar note to the Franklin Bank or any other note, and that he never agreed to assume the payment of any of the company's notes on which plaintiff was an indorser; that he paid the three hundred dollar Lang note for the reason he was getting ready to move to New

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York and was threatened with an attachment if he did not pay the note and that he paid it to avoid an attachment. He also testified that there was a dispute between plaintiff and the carriage company about the cost of repairing a buggy which the plaintiff had torn up, and that the clause in the contract in regard to his obligations to the company had reference to this dispute, and after the contract was entered into he paid thirty dollars to the company, the cost of repairing the buggy the plaintiff had torn up. In rebuttal the evidence tends to show that there was no dispute between the company and defendant in reference to repairs on a buggy and the defendant never paid thirty dollars on account of repairing a buggy torn up by the plaintiff.

The court found the issues on both counts for defendant. Plaintiff appealed.

BLAND, P. J. (after stating the facts as above.) — So strong is the legal presumption that a written contract, unambiguous and complete in itself, contains all the terms of the agreement between the parties, that parol evidence will not be heard in an action on a contract to vary or contradict its terms. Evans v. Mfg. Co., 118 Mo. 548; Tracy v. Iron Works, 104 Mo. 193; Black River Lumber Co. v. Warner, 93 Mo. 374; Bunce v. Beck, 43 Mo. 266. Corelated to this rule, is the rule in equity suits to correct a written contract, on the ground of mistake that casts upon the party asserting the mistake the burden of overthrowing, by evidence that is clear and convincing, the prima facie presumption, that the contract exhibits the ultimate agreement of the parties, and of showing that the mistake was mutual. Judson v. Mullinax, 145 Mo. 630; Parker v. Vanhoozer, 142 Mo. 621; Sweet v. Owens, 109 Mo. 1; Gaylord v. Ins. Co., 40 Mo. 13; Benn v. Pritchett, 163 Mo. 560.

In plaintiff's letter of July 30th to defendant, he proposed, among other things, that the defendant should

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assume all his responsibility for the stocks and papers and all his financial responsibility relative to the company. Defendant promptly answered that he could not accept this proposition. Every proposition contained in the letter, except the one to assume plaintiff's financial responsibility relative to the company, and to furnish a buggy, was ultimately accepted and was embraced in the contract, therefore, it is a reasonable inference that defendant's rejection of plaintiff's proposition of July 30th was on account of his unwillingness to assume plaintiff's financial responsibility relative to the company, that is, to save him harmless as an indorser upon the four thousand dollar note of the company to the Franklin bank. The only scrap of evidence tending to prove plaintiff's contention is the pencil memorandum offered in evidence and his testimony in respect thereto. He testified that he wrote this memorandum at the time the contract was made and that it was understood between himself and defendant that it was to be incorporated in the contract. Opposed to this evidence is, first, the fact that it was not copied into the contract; second, that a copy of the contract was handed to plaintiff after it was prepared; that he held the copy in his hand and followed the defendant as he read aloud the other (the carbon copy); that he is an educated physician and did not discover the mistake and never discovered it until after he was called on to pay the balance due on the note; third; that at no time during the negotiations between plaintiff and defendant was his liability as an indorser on this or any other note of the company ever discussed or even mentioned; fourth, the improbability that a sane business man would agree to pay $3,097.50 or its equivalent, as did the defendant, for a sixteen hundred dollar note on a concern whose solvency was in doubt, and two thousand dollars of its capital stock of uncertain value, and in addition thereto, agree to assume the liability of an indorser on a four



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thousand dollar note. It seems to us that on the plaintiff's own showing, the weight of the evidence is against his contention that a mistake was made in writing up the contract. The judgment is for the right party under the evidence and is affirmed. *Reyburn* and *Goode, JJ.*, concur.

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## STATE ex rel., CHANDLER, Appellant, v. HUFF et al., Respondents.

St. Louis Court of Appeals, March 1, 1904.

1. MUNICIPAL CORPORATIONS: Order Incorporating Village: Collateral Attack. An order made by a county court, incorporating a village, is a judgment having the force and effect of other judgments rendered by courts of competent jurisdiction, and is not open to collateral attack, unless it is void on its face.

2. ———: ———: Description of Territory. The term "Westerly," in the description of the territory which is embraced in a village incorporated by order of the county court, means due west, and does not render such order void for uncertainty in the description.

3. ———: ———. A county court has no jurisdiction to make an order incorporating a village which is already incorporated.

4. ———: Quo Warranto: Parties. The action of quo warranto will not lie to oust the officers of a *de facto* municipal corporation, upon the ground that such municipality is not legally incorporated, when the sole purpose of the proceeding is to test the validity of the incorporation; such a proceeding must be brought directly against the municipality.

5. ———: ———: Laches. Where a *de facto* municipality has acquired property, contracted debts and assumed jurisdiction over streets for fifteen or twenty years, a court, on the grounds of public policy, will not entertain an action to annul its authority.

6. ———: Repeal of Law. The act of 1895 (sec. 108, p. 90, laws of 1895), relating to cities of the fourth class, while repealing the former law, did not have the effect to repeal the municipal charters obtained thereunder.

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Appeal from Lawrence Circuit Court.—*Hon. H. C. Pepper,* Judge.

AFFIRMED.

*White & M'Cammon* for appellant.

(1) That there was no plat filed of the land described in the petition for incorporation in 1871, did not invalidate the incorporation. State ex rel. v. Young, 61 Mo. App. 494. (2) The objection made by defendants to the description of the commons in the order of 1871, that the word "westerly" is indefinite, is not well taken. "Westerly" has been frequently held to mean due west. Seaman v. Hogeboom, 21 Barb. 398; Jackson v. Reeves, 3 Caines 293; Brandt v. Ogden, 1 Johns. 156; Bosworth v. Damizien, 25 Cal. 297. (3) The repeal in 1895 while Ash Grove was not operating under its charter of 1884, conceding that the court legally incorpoated it in 1884, revoked and annulled all rights that it had acquired by virtue of the order of the court incorporating it, for the reason that Ash Grove was not when said repealing statute was enacted, "operating" as a city of the fourth class and had not been so operating for seven years. Webster defines the word operate: "To perform a work or labor; to act; to exert power or strength; to put into or continue in operation or activity." Rosencrans v. Ins. Co., 66 Mo. App. 361; State ex rel. v. Railroad, 140 Mo. 539; Stone v. Howard Ins. Co., 153 Mass. 475, 27 N. E. 6; McKenzie v. Ins. Co., 112 Cal. 548, 44 Pac. 992; Ins. Co. v. Cotton Mfg. Co., 125 Ill. 131, 17 N. E. 775. (4) The incorporation of the town of Ash Grove by the county court in 1871, being valid never having been attacked in any direct proceeding for that purpose, the action of the county court in 1884 was void, and no rights, franchises nor powers vested in Ash Grove as a city of the fourth class

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thereby. (5) That the city of Ash Grove was permitted from 1884 to July, 1888, to sue and be sued in the courts of this State, did not constitute such a recognition of the town as a city of the fourth class as to estop the State or the relator from attacking the validity of such incorporation directly in this proceeding. As held in numerous cases, the validity of the incorporation could not be questioned in that collateral way. The opinion in State v. Fuller, 96 Mo. 167, offered in evidence expressly so states. If the question could not be raised in any of those cases how can an estoppel exist because it was not raised. This opinion, offered by defendants, affords another instance of "an engineer hoist with his own petard." The same decision has been reached by this court. City of Billings v. Dunnaway, 54 Mo. App. 1; City of Clarence v. Patrick, 54 Mo. App. 466; City of Trenton v. Devoras, 70 Mo. App. 12; State ex rel. v. Mineral Land Co., 84 Mo. App. 39.

*Vaughan & Coltrane, J. C. Hayden* and *J. O. Martin,* City Attorney, for respondents.

(1) The respondents contend that the incorporation of the original town of Ash Grove was void for two reasons: First, because the limits embraced about 160 acres of the agricultural lands; and, second, because the description of its limits was uncertain and indefinite. In either event the order of incorporation was void and it was not necessary to have the town disincorporated before an order could be made incorporating it as a city of the fourth class. If this point is well taken for either of these reasons, then in 1884, when Ash Grove was incorporated as a city of the fourth class, the county court had the power to incorporate it by the order made. The following cases sustain the above contention. State ex rel. v. McReynolds, 61 Mo. 203; State ex inf. v. Fleming, 158 Mo. 558; State ex rel. Lee

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v. Jenkins, 25 Mo. App. 484. (2) County courts have exclusive jurisdiction to incorporate cities of the fourth class. The authority to act is conferred upon them by the filing of a petition. There were houses in this instance and people and lands, all the necessary ingredients to make a town as was said in 16 Mo. 88. Hence the county court of Greene county had jurisdiction to incorporate the city of Ash Grove in 1884. Its order is of the same force and effect as that of any other court having jurisdiction of a subject-matter. State v. Searcy, 39 Mo. App. 393; State ex rel. v. Young, 84 Mo. 90; State v. Evans, 83 Mo. 319; State ex rel. v. Weatherby, 45 Mo. 17. (3) The State and relator are both concluded on account of laches from denying the regularity and legality of the incorporation of the city of Ash Grove. It was incorporated in 1884 and for several years thereafter exercised its functions as a municipality. The State's agent, the county court, created it, and the State by proxy, was present at its birth and recognized its legitimacy. The State courts and officials subsequently recognized its corporate entity and can not after so long a time deny its legal existence and right to live. State ex rel. v. Westport, 116 Mo. 582; State ex inf. Jackson v. Mansfield, 72, S. W. 471; State v. Leatherman, 35 Ark. 81; 1 Beach, Pub. Corp. secs. 37 and 56; Jameson v. People, 16 Ill. 256; People v. Farnham, 35 Ill. 562; Copeland v. City of St. Joseph, 126 Mo. 434; High on Extra'y Rem. (2 Ed.), secs. 658-668.

STATEMENT.

On the information of the prosecuting attorney of Greene county, at the relation of W. T. Chandler, the defendant, T. Polk James, was required to show by what authority he exercised the office of mayor of the city of Ash Grove, in said county, and the other defendants by what authority they exercised the functions of common councilmen of said city. The controversy grew

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out of the following two orders made by the county court of Greene county incorporating the town of Ash Grove. The first, made May 8, 1871, omitting caption, reads as follows:

"Now at this day comes a number of the citizens of the town of Ash Grove, in Greene county, Missouri, and file their petition asking that they be incorporated under the provisions of chapter 41, title 15, General Statutes of Missouri, said petition setting forth the following metes and bounds, embracing the following quarter of said town, that is to say: The east half of the northwest quarter of the southwest quarter, the east half of the southwest quarter of southwest quarter and the east half of the southwest quarter of section 21, township 30, range 25, and as commons to said town on the west side of said limits one quarter of a mile in a westerly direction. And the court being satisfied that two-thirds of the taxable inhabitants of said town have signed said petition, and that the prayer of said petitioners is reasonable, it is ordered and hereby declared that said town is hereby incorporated by and under and within the above described limits and shall be henceforth known as a body corporate by the name and style of the inhabitants of the town of Ash Grove. And it is further ordered by the court that J. F. G. Bentley, L. P. Downing, William Comegys, W. S. Hawkins, and Henry Hay be and they are hereby appointed trustees of said town of Ash Grove."

The second order, dated January 1, 1884, omitting caption, reads as follows:

"Now at this day comes on to be heard the petition of J. F. G. Bentley and other inhabitants of the town of Ash Grove, praying to be incorporated as a city of the fourth class under and by virtue of the provisions of article 1, chapter 89, Revised Statutes of Missouri. And said petition being by the court fully heard and carefully examined, and it appearing to the court from said hearing and examination of said petition, and from evi-

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dence submitted that a majority of the taxable inhabitants of said town of Ash Grove in the metes and bounds hereinafter described, have signed said petition, and that said town contains a population of more than 500 and less than 5000. It is therefore by the court ordered that said city of Ash Grove be, and the same is hereby incorporated, and that the inhabitants within the following described metes and bounds, viz.: Beginning at a point in section 21 on the east side of the Walnut Grove road one-fourth of a mile south of the north line of said section 21, being the southwest corner of northeast quarter of northwest quarter of section 21, township 30, range 24, running thence west 20 rods, thence north 20 rods, thence west 40 rods, thence south 20 rods, west 20 rods, to the section line between sections 21 and 20, thence south one-fourth mile, west one-fourth mile into section 20, thence south 40 rods, thence west one-fourth mile, thence south 80 rods, thence east one-fourth mile to section line between sections 21 and 20, thence south one-fourth mile, thence east one-half mile to section line between sections 21 and 28, thence north one-half mile, thence west one-fourth mile to east side of Walnut Grove road, thence north one-fourth mile to beginning, all in township 30, range 24; shall be a body politic and incorporate by the name and style of the city of Ash Grove, and the following named persons shall be the first officers of said city of Ash Grove who shall hold their offices respectively until the general election for city officers in said city, to be held on the first Tuesday in April, 1884, and until their successors are elected and qualified: As mayor, David Allen; as marshal, Thomas McCall; as aldermen, W. C. Swinney, Wm. Comegys, J. W. B. Appleby and W. C. Crane."

The town operated under the first order of incorporation until its officers were superseded by the officers appointed under the second order of incorporation. The city continued to operate under the second order of incorporation until April, 1888, when its councilmen re-

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signed and the mayor and the marshal removed from the town. The resignation of the councilmen was for the purpose of avoiding the service of a threatened mandamus on them to compel them to levy a special tax against the inhabitants of the city to pay a judgment of thirty-five hundred dollars recovered by Mrs. Sarah Hurst against the city of Ash Grove, which had just been affirmed by the Supreme Court. The judgment was compromised and paid by voluntary contributions of the citizens of Ash Grove on March 20, 1902. After the satisfaction of the judgment, a justice of the peace of Ash Grove called an election to be held in said city, in May, 1902, for the purpose of electing city officers. Pursuant to the call or notice of the justice of the peace, an election was held at which respondent James was elected mayor, and the other respondents elected councilmen of the said city, and they were duly inducted into their respective offices and were discharging the duties thereof when this proceeding to oust them was commenced. From April, 1888, until after the election in May, 1902, the city was without any officer or officers and made no effort to operate under either of the orders of incorporation. At the time it ceased to operate as a city, it is shown it was indebted to the marshal in the sum of one-hundred and twenty-five dollars, which has never been paid, and it also owed A. T. Weir, a lumber merchant, eighteen dollars not yet paid. The second order of incorporation takes in most of the land described in the first order and a considerable territory in addition thereto.

Over the objections of the relator the respondents were permitted to prove that at the date of the first order of incorporation (May 8, 1871) the village of Ash Grove contained from one hundred to one hundred and fifty inhabitants; that it owned no lands except, possibly a jail lot, and that a large part of the territory taken in by the order of incorporation was wild and uncultivated land, not laid off in town lots or blocks and that other

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portions of the territory consisted of agricultural lands not divided into lots or blocks for building purposes.

The judgment of the circuit court was for respondents. Relators repealed.

BLAND, P. J. (after stating the facts as above).—1. The contention of relators is that having, in May, 1871, exercised its jurisdiction to incorporate the village of Ash Grove, the county court was thereafter without jurisdiction to again incorporate it, and especially so while the original order of incorporation was in force. This exact question was passed on by this court in State ex rel. v. Young, 61 Mo. App. 494, where the court said: "Under the existing statute (Revised Statutes, 1889, chapter 30, article 1), there are two modes of incorporating cities, towns or villages, based on different conditions. If the city or town has been previously incorporated, the county court has no authority or jurisdiction over the proceedings for the change from the existing organization to the new. To effect a change in such a case, the municipal authorities must pass an ordinance to that effect and submit it to the legal voters of the city or town, and, if it is ratified by a majority of the voters voting at such election, it then becomes the duty of the mayor to issue his proclamation declaring the result. This completes the incorporation." To avoid the force of this decision the respondents sought to show by the evidence, *de hors* the record, that the first order of incorporation was a nullity, and were permitted by the court to introduce evidence tending to establish its nullity. The order incorporating the village was a judgment having the force and effect of any other judgment rendered by a court of competent jurisdiction. State ex inf. v. Fleming, 147 Mo. 1; State ex inf. v. Fleming, 158 Mo. 558. For this reason the order of incorporation was not open to collateral attack. Kayser v. Trustees of Bremen, 16 Mo. 90; State ex rel. Read v.

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Weatherby, 45 Mo. 17; State v. Evans, 83 Mo. 322; Macey v. Stark, 116 Mo. l. c. 494; Leonard v. Sparks, 117 Mo. l. c. 108. If, however, as the respondent contends, the order of May 8, 1871, is void on its face, then it can not be said that the county court did at that time exercise its jurisdiction to incorporate the village of Ash Grove, for an order or judgment of a court that nullifies itself is as though it had never been entered, and jurisdiction in the county court would remain, notwithstanding the void order of May 8, 1871, incorporating Ash Grove as a village.

Respondents say the description of the commons in the order of May 8, 1871, as "westerly," is so indefinite and uncertain as to make the description of the territory attempted to be incorporated void. If the word "westerly" is construed to mean due west, then the description is not indefinite but is definite and certain. In Bosworth v. Danzien, 25 Cal. 296, it was ruled: "The term 'northerly' when used in a grant or conveyance, unless controlled by monuments in the description, means due north." In Brandt v. Walton, 1 John. Rep. 156, it was held: "The term 'northerly' in a grant, where there is no object mentioned to direct the inclination of the course toward the east or west, is construed to mean due north." In Jackson v. Clark, 3 Caine's Rep. *293, it was said that when "the courses are northward, southward, eastward, and westward, it is a settled rule of construction, that when courses are thus given, you must run due north, south, east and west." That the word "westerly" in the description of the territory incorporated, should be construed to mean due west, we think is supported by both authority and reason. We are, therefore, forced to the conclusion that the order incorporating the town on May 8, 1871, is not void upon its face. This leads to the conclusion that the county court of Greene county was without jurisdiction to make the order of January 1, 1884, incorporating Ash Grove as a city of the fourth class.

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2. But the city of Ash Grove is not made a party defendant. In State ex rel. v. Coffee, 59 Mo. 59, it was ruled that *quo warranto* would lie to oust the respondent, who was holding the office of mayor of the town of Knobnoster, on the ground that the special act of the Legislature incorporating the town was void. But it does not appear in that case that the proceeding was commenced for the sole purpose of testing the validity of the corporation. In Reg. v. Jones, 8 Law Times Rep. (N. S.) 503, and in Williams v. Sacramento County, 58 Cal. 238, the proceedings in each case were brought against the officers of the municipal corporation and the municipality was not made a party defendant, and it appeared from the complaint that the real purpose of the proceeding was to test the legality of the municipal charter. It was held that the municipalities were the real parties in interest and necessary parties defendant, and the courts refused to permit the charters to be repealed by a judgment of ouster against the officers. Substantially the same ruling was made in the case of State v. Atlantic Highlands, 50 N. J. L. l. c. 458; Holloway v. Dickinson, 54 Atl. Rep. 529; State ex rel. Weinsheim, v. Leischer, 94 N. W. Rep. 299. High, in his work on Extraordinary Remedies, under title of "Quo Warranto," at section 696, says: "The information will not lie against a municipal officer, as the mayor of a city, when the real purpose of the application is to test the legality of the municipal charter, since the courts will not permit a charter to be repealed in a proceeding directed, not against the corporation, but against an individual corporator or officer." Unquestionably, the municipality is the real party in interest and for this reason is a necessary party and should be made a party defendant. Section 444, R. S. 1899. Nominally, this proceeding is to oust the defendants from their offices, but it is apparent on the face of the information, and put beyond doubt by the evidence offered at the trial by the relator, that the real object of the

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action is to deny to the city of Ash Grove the right to operate as a city of the fourth class by obtaining a judgment which, in effect, would repeal the order of January 1, 1884, incorporating it as a city of the fourth class; no other cause is attempted to be made against the respondent except as it is made through the invalidity of the charter. The sole purpose then of the proceeding is to test the validity of the charter. We think it is indispensable that the proceeding should have been brought directly against the city and that the trial court for this reason, if no other, rendered the proper judgment.

3. The old English cases fixed a period of twenty years as the limit in which an information to test the validity of a city's charter might be filed. Subsequently the courts reduced the period to six years. Rex v. Dicken, 4 T. R. 282. This period was afterwards fixed by statute. 32 George III, ch. 58. In State ex rel. Town of Westport, 116 Mo. 582, it was held that twelve years, where the corporation had been operating and recognized by the courts and legislators of the State, was a sufficient period to estop the State on the ground of laches to call in question the validity of the charter. It seems to us that on grounds of public policy the period of limitation in which informations of this character may be filed should be fixed by statute. In the absence of such a statute the courts in the exercise of a wise discretion upon the grounds of public policy should, as was done in the Westport case and in the case of State ex rel. v. Town of Mansfield, 99 Mo. App. 146, refuse to repeal the charter of a municipal corporation which had stood unchallenged for a period of ten or fifteen years, when the municipality has acquired property and contracted debts and assumed jurisdiction over the streets and alleys of the city, and to preserve the public peace of the community. People ex rel. Hanker, 64 N. E. 253.

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4. The corporation was not affected by section 108 Laws of 1895, p. 90, as contended by the relators. The meaning of that section is that the Act shall not have the effect to repeal municipal charters obtained under the laws repealed by the act. The section repeals the laws under which these charters were obtained, but does not repeal the charter themselves.

The judgment is affirmed. *Reyburn* and *Goode, JJ.*, concur.

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## KELLEY, Respondent, v. CHICAGO & ALTON RAILWAY COMPANY, Appellant.

St. Louis Court of Appeals, March 1, 1904.

1. **MASTER AND SERVANT: Safe Appliances: Proof of Negligence.** In an action by an employee against his employer for injuries which have resulted from the plaintiff's being put in an unsafe place to work, or being provided with unsafe tools, unless the accident carries on its face proof of negligence on the part of the employer, proof of the facts constituting his negligence must be produced in order to make him responsible for the injury.

2. ——: ——: **Notice.** It is an essential element of negligence on the part of the employer in such a case that he had knowledge of the defect complained of, or such an opportunity to know as to be the equivalent of knowledge.

3. ——: ——: **Duty of Servant.** It is the duty of a servant who has been put in charge of defective appliances, with notice that they are defective, to give proper notice to his employer, of the defect and make a request for proper appliances, and if, after sufficient opportunity he fails to give such notice and make such request, he can not recover for injuries caused by such defective appliances.

4. ——: **Assumption of Risk.** An employee assumes the risk naturally incident to his occupation, including the risk of injury from defective machinery, after the master has used ordinary care and reasonable diligence to furnish safe machinery and to keep it safe, and especially the risk incident to his (the servant's) own neglect.

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Appeal from Audrain Circuit Court.—*Hon. E. M. Hughes,* Judge.

REVERSED.

*F. Houston* and *C. C. Madison* for appellant.

(1) In the light of plaintiff's admission and the undisputed evidence, he is precluded from a right to recover in this action and in such circumstances it was the plain duty of the trial court to direct a verdict for defendant. Feary v. Railroad, 162 Mo. 105; Holmes v. Leadbetter, 95 Mo. App. 419; Spooner v. Railroad, 23 Mo. App. 411. Plaintiff's testimony shows that his injuries were not produced by any act of negligence of defendant, but were due to an accident or peril of the employment well known to plaintiff, and the danger of being so injured was assumed by plaintiff. Wendall v. Railway, 75 S. W. 689; Cunningham v. Journal Co., 95 Mo. App. 47; Lectior v. Grieb, No. 5417, K. C. Ct. of Appeals, Nov. 9, 1903; Holt v. Railway, 84 Mo. App. 443; Beasley v. Transfer Co., 148 Mo. 413; Pavy v. Railroad, 85 Mo. App. 218; Steinhauser v. Spraull, 127 Mo. 541; Fugler v. Bothe, 117 Mo. 475; Marshall v. Hay Press Co., 69 Mo. App. 256; Bohn v. Railroad, 106 Mo. 429; Howard v. Railway, 173 Mo. 524.

(2) The court erred in giving plaintiff's instruction No. 1. Said instruction is too narrow in that it ignores the question of whether defendant had knowledge, or a reasonable opportunity of knowledge, of the risks and defects in time to have repaired them, and imposes an absolute duty to furnish safe appliances. Hester v. Dold Packing Co., 84 Mo. App. 451; Zellars v. Water & Light Co., 92 Mo. App. 107; Herbert v. Boot & Shoe Co., 90 Mo. App. 305. (3) The court erred in giving plaintiff's instruction No. 2. Like the first instruction it erroneously tells the jury that defendant

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was bound to furnish reasonably safe appliances and a reasonably safe place in which to work at all events and that plaintiff did not assume such risks; also stated the rule of contributory negligence incorrectly. Shea v. Railway, 76 Mo. App. 29; Bradley v. Railway, 138 Mo. 293; Neugent v. Milling Co., 131 Mo. 241.

*George Robertson* for respondent.

(1) Under the testimony submitted the plaintiff was entitled to recover and plaintiff's instructions 1 and 2, were properly declared the law. Booth v. Railway, 76 Mo. App. 516; Bradley v. Railroad, 138 Mo. 293; Hamman v. Coal & Coke Co., 156 Mo. 232; Cardwell v. Railway, 90 Mo. App. 31; Nash v. Dowling, 93 Mo. App. 156; Curtis v. McNair, 173 Mo. 270; Henderson v. Kansas City, 76 S. W. 1045; Renfro v. Railroad, 86 Mo. 302; Moore v. St. Louis Wire Mill Co., 55 Mo. App. 491; Porter v. Railway, 71 Mo. 66; Condon v. Railroad, 78 Mo. 567. (2) Contributory negligence is an affirmative defense and must be established by the evidence. The burthen is upon the defendant to establish it. Hudson v. Railway, 32 Mo. App. 667; Mitchell v. City of Clinton, 99 Mo. 153; Thompson v. Railway, 65 Mo. 34.

STATEMENT.

Action for damages on account of an injury received by the respondent because of alleged negligence on the part of the appellant. The defenses pleaded consisted of a denial of the negligent conduct charged, a special plea of contributory negligence, in which it is averred that the defective appliances complained of by the respondent were in his charge, and if they were out of repair it was his duty to repair them, or procure others; and the defense that the injury resulted from a danger incident to respondent's employment and due to the condition of the appliances he was working with and of which, therefore he assumed the risk.

Kelly, the plaintiff, engaged to work for the appel-

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lant railway company as a locomotive fireman, in September, 1902, having previously had three years experience in that vocation. The alleged accident in which he was hurt occurred on his second run, which began on the evening of September 22d, at half past eleven or twelve o'clock. He was called at six o'clock and put on an engine (No. 305) to run from Slater to Kansas City. The train was not made up, however, until later and at the hour first mentioned. Meanwhile, from six o'clock until the train started, Kelly stayed on the engine and observed the conditions under which he would have to work and the appliances he would have to work with. He said he got a fall while on the trip and in consequence received the injury for which he sues. The petition avers the fall was due to the negligence of the company in furnishing defective and leaking hand oilers, lamps and torches, from which the oil would drip on the floor of the engine cab, making it slippery, and soaking into the shoes of the operatives on the engine; that in consequence of the slippery condition of the floor and of his shoes, due to the leaking oil, and in consequence, too, of the lights going out because the lamps would not hold oil, he struck one foot against an obstacle, the other foot slipped on the floor and he fell on a hard substance and was hurt. We will reproduce later the respondent's narration or the circumstances of the accident, but before doing so will state what he said about the condition of the engine cab and the appliances therein. Kelly swore that over the steam-gauge and the water-gauge were two small lamps, intended exclusively to illuminate those gauges; that there should be in an engine two red and white lanterns to signal with and two torches, one for the engineer and one for the fireman. He found those appliances and utensils there, but, he said the steam-gauge lanterns, torches and some oilers were leaking. He said, too, it was the duty of the fireman to keep the lamps filled with oil and all the appliances in good condition. As to the torches his statement was

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that they were packed in a box on the front of the tender until needed for use. Those torches and other lights leaked so much, he said, that they had to be frequently filled and it was hard to keep them burning. He testified that oil dripped from several vessels and spread over the floor of the cab, greasing it and making his shoes so slippery that it was impossible to stand with safety on the floor of the cab. He discovered the leaky condition of the torches before leaving Slater. The fall occurred at Higginsville, forty miles from there, while the engine was standing on a side track to let another train pass; in which contingency the headlight of the stationary engine must be hooded or covered. It was the fireman's duty to do this; and in order to do it Kelly lighted a torch, went over the box-seat on the left hand side of the cab, through the cab window, walked along the running-board to the front of the engine and covered the light. When the train was ready to start he repeated the trip, to unhood the headlight and, as he was returning, the torch went out; he said, because all the oil had escaped from it. This left him in the dark and as he entered the cab he struck his foot against the box-seat, stumbled, his other foot slipped on the greasy floor, he fell and was hurt. We will quote his version of the accident as it appears in several parts of the testimony.

"Q. How far did you go before anything happened? A. Higginsville.

"Q. How far is that west of Slater? A. As it was my first trip on the west end I couldn't really say.

"Q. What was necessary for you to do there? A. When we turn out to meet another train, according to the book of rules, we have to cover the headlight, and when it passes, uncover it, and I covered it.

"Q. Did the engine turn on the side track there? A. Yes, sir.

"Q. What did you do? A. I covered my headlight.



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"Q. Explain how you went around there and how you came back? A. There's a running-board on the outside of the engine going to the headlight and I went out the running-board.

"Q. That is to walk around to the headlight? A. That's what it's for.

"Q. How did you get out? A. I walked out on the running-board.

"Q. You don't walk out that cab? A. There's a little window by the fireman's seat-box and it was raining and I had it closed, and I opened the window and walked out over the running-board and took my torch as there were pipes along there, I took it and covered the headlight.

"Q. Where did you go in the engine? How did you get back into the engine? A. I went back the way I came, over the running-board, and I stepped down on the box-seat.

"Q. Well, what happened to your torch while you was out there? A. It went out.

"Q. Why did it go out? A. For want of oil.

"Q. It had all run out? A. Yes, sir.

"Q. When you came back into the engine did you have any light? A. No, sir.

"Q. What happened when you came back into the engine? A. When I came back into the engine that time I sat down on the seat-box as I had nothing else to do; I had covered the headlight and the other train hadn't shown up, and I sat down until time to go out and uncover it.

"Q. Did you have to put in any oil? A. Not then, not until we was ready to start out; then, when the other train passed us I was ready to start out; I walked out and uncovered my headlight and walked back and had to step over the seat-box to put in a fire; I had to carry a very hot fire, which called me to put one in as soon as we started; in going back *without a light* my toe caught on the seat-box and my other foot slipped out from under

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me like that, and I fell down in the deck with my head and shoulders in the tank and my left groin on the apron and from the way I fell it appeared I fell on some loose coal that fell down; naturally rolls down.

"Q. Where did it injure you? A. In the left groin, right in there."

On cross-examination, Kelly testified as follows:

"Q. What was it you knocked your toe on? A. My seat-box; the seat-box which we sit on; the little box we sit on called the box-seat.

"Q. What was it caused you to fall? A. When I opened this door that goes in from the running-board there's a little space there of about that distance and then my seat-box sets on a level with that, about a foot or fourteen inches high and about two feet long, maybe a little longer; I have to step over that; most of the engines have a little space; the seat-box moves back and you can put your foot in between like that; but this box-seat was jammed against the boiler-head and the only way to get over it was to step over it and *in doing it my torch went out and my toe caught about this much;* I fell or stepped over like that, and this foot slipped from under me and I went headlong down with my head and shoulders in where the coal goes and my feet towards the coal door and my left groin on that place between the engine and tank.

"Q. How long had the light been out? A. It went out while I was out there.

"Q. Before you fell? A. It went out while I was out; I lit it and went out there and it went out between the head end of the engine and the cab; it was raining.

"Q. What caused you to fall was knocking your toe? A. I didn't get my foot high enough; didn't raise it high enough; couldn't see to; and my other foot naturally would come out from under me quicker than it would if it was dry, I suppose.

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"Q. Then oil on the floor had nothing to do with causing you to stump your toe? A. No, but the oil on that sole—probably if the oil hadn't been on the sole I would have had good foothold enough to catch myself; but as soon as that come the rest of my foot went so slick, it went out from under me and made me fall quicker; if I hadn't had the oil I would have fallen slower and had an opportunity to grab something.

"Q. If you hadn't stumped your toe you wouldn't have fallen? A. No, sir, I suppose not, unless I had fallen later on.

"Q. At the time you did fall, though? A. No, sir, at the present time, no, sir, I wouldn't have fallen then.

"Q. It wasn't the slippery condition of the floor that really caused you to fall, it was knocking your foot as I understand? A. If the floor had not been in a slick condition I wouldn't have got the grease on my shoe.

"Q. But it was knocking your toe that caused you to fall down, wasn't it? A. Yes, sir; I presume it was.

"Q. What I want to find out is, I want to know whether it was because of your stumbling and knocking your foot against some object that caused you to fall, or whether it was because you slipped? A. I have said before that it did."

Kelly testified in regard to the condition of the torch before the trip began as follows:

"Q. That was the steam-gauge lamp that leaked? A. Yes, sir.

"Q. What other lamp leaked? A. The torches leaked.

"Q. What are the torches? A. Those you carry around the engine when you are oiling; little cans about an inch and a half at the top and about three at the bottom.

"Q. You don't mean what people commonly call a torch blazing? A. Yes, sir, a piece of wick; it looks

like a little ten cent tea pot with a piece of wick running out to light by; there's a light about that big.

"Q. When did you first discover it was leaking? A. Well, before we left."

The torches were not lighted except as needed; nor was any light kept in the engine for illuminating purposes, except those used to throw light on the gauges, as appears from the following testimony of the respondent:

"Q. Wasn't there a little white light, ordinary hand lantern, sitting in the cab? A. That is the one I went over to draw; I went over to draw supplies and they told me I didn't have any, I started to call for a requisition and they told me they didn't have them; I made the remark, 'There might some accident happen, and you had better look around a little closer and see if you can find something.'

"Q. What made you think an accident might happen? A. You are always subject to accident on a railroad.

"Q. What connection was there between that and the light? A. In case an accident happened.

"Q. What sort of accident? A. You might break in two, a rail break or any kind of accident that would happen.

"Q. Did you want it in the cab of your engine to light the engine? A. You are supposed to keep them lit in case of an accident that you have to go ahead and flag.

"Q. I asked you, did you use a light of that sort in the cab of the engine, for lighting the cab of the engine. A. No, sir I used the torch; I am not supposed to use them at all; I am supposed to keep them lit in case of an accident.

"Q. Did you keep the torches lit in the engine all the time. A. Not the torches, no, sir; but the lights you have reference to I did.

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"Q. You said there were five torches? A. No, five hand oilers on it.

"Q. How many torches? A Two.

"Q. How many of those torches were lit during the five hours between the time you got on the engine? A. We only light them in case we need to look at anything; we don't keep them lit.

"Q. In other words, you don't keep any lights in the cab? A. Nothing but the white and red light to flag by and they are kept there all the time for that business.

"Q. You don't keep them to light the cab? A. No, sir; not as I understand the regulations; there's not supposed to be any light on the cab when running.

"Q. You received a copy of the rules and regulations when you went into the employment? A. Yes, sir.

"Q. And read them? A. Yes, sir; read certain parts of them presented to me, like any of the rest of them.

"Q. Well, what I want to get at, these two lamps were not kept there for the purpose of lighting the cab when running?"

Although the plaintiff said he was severely hurt by the fall, he never mentioned it to any one on the run, but did complain of being sick. The engineer did not observe that he met with a fall during the trip; and another man who was in the engine likewise failed to observe the accident, and testified that it could not have happened without his observing it. Kelly made no report of the accident until sometime in November. According to the testimony of physicians there was a severe abscess in the groin, which could be attributed to such an accident as he describes.

Under the instructions given, the jury returned a verdict for the respondent for $1271, and the railway company appealed.

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GOODE, J. (After stating the facts as above.) We have preferred to state this case largely in the language of the respondent in order to be sure to make a presentation that is fair to him, and will follow the same plan in further reference to the facts. Our copious transcriptions from his testimony show he attributes his fall and consequent injury to the torch-light failing for lack of oil, thereby causing him to stumble in the darkness over the seat-box, and to his footing being insecure because of the oil on the cab floor and on his shoes. It is plain that if the fall was not due to the respondent's own inadvertence, those circumstances caused it; and it becomes important to ascertain whether either or both of them can be traced, in the light of the evidence, to some neglect of duty by the railway company that would be the proximate cause of the injury. The two causal events resolve into one, namely: leaking oil vessels; and the essential inquiry is, was the railway company to blame for the locomotive having such defective vessels on the trip in question? It was, of course, incumbent on the company to exercise ordinary care to furnish torches that would retain oil and burn the usual time, and to keep the cab floor in a safe state for use by employees. This proposition is a corollary of the general doctrine that employers must be careful to provide employees a safe place to work and safe tools to work with. Bnt an employer is not convicted of a breach of duty in this respect, by proof that an accident happens because of the defective tool or working place, except in instances when the occurrence itself speaks—that is when the accident carries proof of negligence on its face. Unless the negligence of a defendant is proclaimed as the proximate cause of a casualty by the very happening of it, proof that his negligence was the cause must be otherwise produced, to fasten responsibility on him; for a party who alleges negligence must establish it by one kind of proof or the other. Fuchs

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v. St. Louis, 167 Mo. 620; Erwin v. Railroad, 94 Mo. App. 289; Schuler v. Railroad, 87 Mo. App. 618. An accident betokens negligence on the part of some person when it is of a kind that experience shows would not otherwise have happened. The facts of the present case do not call that rule of evidence into play, as men often stumble and fall without anyone's fault. The leaking vessels suggest negligence; but they do not demonstrate it; and if they did, the suggested negligence may or may not have lead to the respondent's fall. Besides, there comes up the question of whose negligence was responsible for the leaky state of the vessels, if it was due to negligence; a question we will take up later. Whether the railway company was to blame for their condition, depends on the degree of diligence it had used to keep the engine supplied with vessels in good order; and whether it was shown to be to blame so as to make it liable in this case for the respondent's injury, depends on the effect of the evidence as showing that it exercised or omitted reasonable efforts to supply good vessels. Reasonable efforts in this behalf would include inspection of the oil vessels at proper intervals, keeping the requisite quantity of those articles on hand, so that a defective one could be replaced, actual replacement as soon as its defective condition was known or ought to have been known, and perhaps other precautions. An essential element of negligence on the part of the appellant was knowledge that the oil tanks were out of order, or such an opportunity to know as is the legal equivalent of knowledge. Machinery and utensils will get out of repair from use; and now and then a mishap will occur from their being out of repair, before the fact is known or could be known by careful management. It is a just rule for the protection of employers that they are not responsible for a mishap thus caused. They must have known, or have had the opportunity to know, of the defect and have had, too, a chance to mend it, for

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liability to attach. Pavey v. Railroad, 85 Mo. App. 218; 3 Woods, Railways, sec. 373.

In Jones v. Yeager, 2 Dillon, 68, a very able judge thus instructed a jury on this subject in a way that clearly explained the law:

"The plaintiff's theory is, that the explosion was caused by the defective boilers. What is the duty towards employees of the owner of a steam engine and boilers in respect to their safe condition? This is an important question, and must be carefully answered. The employer does not, impliedly, engage to insure his servants that there shall be no accidents resulting from the use of such machinery. Steam, which is a necessary, if at the same time dangerous, power, and the danger which attends the use of it, impose upon the owner of machinery propelled by it certain duties and obligations, and these are to use ordinary care and prudence (the degree of which must be proportioned to the danger) to have and to keep the boilers and machinery in a safe and sound condition. If the employer knows that his boilers are defective, or if under all the circumstances, as a reasonable man he should have discovered though he did not, their defective condition, or if he negligently remained ignorant of their defective condition, if the defective condition thereof was the direct and proximate cause of an explosion which injured servants who are blameless, and who did not contribute towards the production of the accident by their own fault or neglect, then the law is that the employer is liable to such servants in a civil action for damages thus occasioned.

"In the application of these principles to the evidence, you will first inquire whether the boilers in this case were unsafe and unfit for use; and if so, whether the defendant knew it, or as a reasonable man, having due regard for the safety of his employees, ought to have known it; for if he ought, his neglect in this respect would be equivalent, in imposing liability, to actual knowledge."

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Such defects as escape attention because there is not time for the master to discover them by ordinary care, the servant takes the risk of as incident to his employment.

Now to establish that the appellant was in fault, two facts are relied on: that the vessels leaked, and that before starting on the run from Slater to Kansas City, the respondent asked the proper employee for others and none were furnished. The vessels leaked; but there is no testimony as to how long they had leaked, or that the officer or employee, whose duty it was to furnish others, knew, or ought in reason to have known, others were needed—in short, there is nothing to prove the company was remiss, except Kelly's notification and request at Slater. The duty of inspecting oil appliances about the engine, filling and keeping them in good order, was on him, he said. His testimony on that subject is as follows:

"Q. I will stop there and ask you what are the duties of a fireman? A. Well the duties of a fireman are to get around on the engine, fill his own oil, and see his lights are all filled and in good working condition, and get his fire ready and put out his signals and keep the engine hot until you get to its destination."

Now that Kelly detected the leaky state of the vessels before starting, and probably no one else could have detected it but the engineer, who was not charged with the duty of reporting, appears from the fact that Kelly filled the oil vessels, as was his duty. We quote again from his testimony:

"Q. How do you know that oil was there (on the floor)? A. I could feel it, and I could see it when we first started out in filling the hand oilers; I have to fill them in the deck.

"Q. When did you first see any oil on the floor? A. The first time I discovered it, I knew the hand oilers were leaking, and filling them the oil ran out at the bot-

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tom while I filled them; I took a piece of waste and wiped it up.

"Q. Wiped it off the floor? A. Yes, sir."

The question of who was to blame for the engine having leaky oil vessels comes down then to the effect of what passed between Kelly and the supply agent at Slater. If Kelly gave notice of the defective appliances to which the accident was due, and requested good ones, he fully discharged his duty, and whatever blame attaches for the accident can not fall on him. On the contrary, if he did not give proper notice or make the proper request, so far as anybody is to blame for the consequences, he is; and his own fault is, of course, not available as a ground of recovery for his injury. When it is a servant's office to keep tools in repair and he carelessly fails to do so, the rule that a master must use care to furnish a servant with reasonably safe tools has no bearing on the case; for the reason that the servant's own dereliction prevented the discharge of the master's duty. Kleine v. Shoe Co., 91 Mo. App. 102; Allen v. Railroad, 37 S. W. 171; Carlson v. Railroad (Ore.), 28 Pac. 497. Now what notice did Kelly give the supply officer at Slater, and what request for perfect utensils did he prefer? Here is his testimony on that subject:

"They (the lanterns) were used as signals in case of wreck or any trouble.

"Q. And not for lighting the cab? A. No, sir; that's the way I understand it.

"Q. The truth is a light interferes with the engineer and it's not considered a good plan to have lights; it prevents him from seeing so well? A. I know the head brakeman rides in the engine, and you put it down so you can see to crack the coal; he may be there and may not; you are not supposed to have any lights, but you are supposed to have torches to go and clean the fire and oil the engine."

Kelly testified that he asked for some lamps or sig-

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nal lanterns before starting from Slater, but could not get any; or rather that he got only a flag and a broken lantern.

"Q. What other lamps were there? A. Well, there was—I don't know of any other; I went over to get some but they failed to give them to me on the ground they didn't have any; *I went for a lantern* and they said they didn't have any—to flag up in case of accident, they says: 'We haven't any; we have been out of supplies *more or less* for two weeks. . . ."

"Q. Didn't you know, in doing this work, that it was a rule of the company that if you discovered anything out of order that it was your duty to report it? A. I done so, yes, sir; I understood it and done so.

"Q. Where did you make the report? A. You are supposed to make the report, that is, if there is anything missing in the line of *torches or lights,* there's a man in the yards, you report to him and he is to give it to you.

"Q. You did that at Slater? A. Yes, sir; and he failed to give them to me. He said they were out of supplies for some time; they were short.

"Q. And failing to get it you went out on the road without it? A. He did give me a piece.

"Q. Well, answer my question? A. I didn't fail to get everything; I got part of a lantern down stairs and part up and put it together.

"Q. And undertook to do your work with it? A. Yes, sir; my jurisdiction is to ask him.

"By the Court: What else did you demand of him but what you got, tell the jury? A. He didn't give me time to demand, when I started to tell him he says: 'I'm out.'

"Q. By the Court: Out of what? A. Supplies; he says we are out and have been out.

"Q. Then you didn't call for any particular supplies? A. Yes, sir; I called for a lantern and flags, and he says; 'We are out of flags,' and threw me a red

rag, and I says, 'Well, you had better look close, if anything happens they would hunt it up,' and he found the bottom of a lantern down stairs and the top upstairs, and he didn't give me any torches or anything else.

"Q. *And you didn't call for any torches, did you?* A. *He told me he didn't have any more supplies.*

"Q. You didn't call for any? A. *No, sir;* when he told me he didn't have any, its no use to call for them.

"Q. What did you ask him for? A. I don't remember; I started to ask him for everything I needed and he said he was out of supplies; supplies mean everything we need on the engine.

"So you didn't really ask him for anything? A. Yes, sir; I asked him for a lantern and for a flag, he gave me a red rag.

"Q. Wasn't it a fact the lantern and flag was all you went for? A. No, sir.

"Q. That is all you called for? A. There was no use *to call for any more.*

"Q. But that's all you did call for? A. I would have called for more if he hadn't stopped me.

"Q. You can answer this question; isn't that all you called for? A. *Yes; its all I called for.*

"Q. You knew it was a rule of the company that before exposing yourself in working or being on the tracks or grounds of the company or working with or being in any manner on or with its cars, engines, machinery or tools, you must examine for your own safety the condition of all machinery, tools, trucks, cars, engines or whatever you may undertake to work upon or with, before you make use of or expose yourself on or with the same, so as to ascertain as far as you reasonably can their condition and soundness, you understand that? A. Yes, sir; I understand everything is supposed to be in good shape before you go out."

It thus appears that the respondent called for a lantern and a flag and nothing else. He made no re-

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quest for a torch, no request for hand oilers, or for a new steam gauge light. But the want of a good lantern and a flag had nothing to do with the accident; which, if due to defective appliances at all, and in so far as it was due to them, is attributable primarily to the imperfect torch—the light that failed—and secondarily to those other imperfect vessels (hand oilers and steam gauge light) from which oil dripped on the floor. But he complained of none of those articles, nor asked for others; and obviously he neither gave notice of the bad torches, nor of the other articles that were in bad order, and no servant of the railway company but himself is shown to have had any notice, actual or constructive, of their condition. If there was a neglect of duty by an employee of the company, it was by the respondent. He had more than five hours after he went to the engine and before the train left Slater, in which to repair appliances that were out of order or procure good ones, and it was his duty to make a reasonable exertion to do one thing or the other. He did neither, and the excuse he offers for his omission is that the supply agent told him when he asked for a lantern and a flag, that the supplies were out. This answer is assumed to have dispensed with the necessity of saying or doing anything further about the engine's appliances; but the assumption is too broad. The response of the supply agent to Kelly's request, as told by the latter in one part of his testimony, comes near to positively excluding the inference that any more was meant than that the supply of lanterns and flags, the articles requested, was exhausted; for he said, in answer to the request for lanterns and a flag: "We haven't any; we have been out of supplies *more or less* for two weeks." And nowhere is the answer of the agent stated in a form that justified the respondent in taking for granted that there were no articles on hand to replace those defective ones which he did not ask for; in other words, that there were no supplies of any kind in reserve. Kelly certainly did not do

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his full duty by asking only for a lantern and a flag, when he knew, if he inspected as his duty required, that there were other tools in bad order and unsafe to use on the trip. The truth intrinsic in his narrative is that he was perfunctory, indifferent and willing to risk the appliances he had. So loose a performance of a most important task would inevitably lead to disaster in a business as hazardous as the operation of a railroad and can not be accepted as adequate. The chief managers of a railway company must trust to employees to notify them of faulty and defective machinery in their respective departments, and Kelly was looked to for information as to the state of the particular appliances we are concerned with. It would be mere guesswork to say he would not have been given a new torch if he had asked for it. No doubt, if some one else had been hurt in consequence of Kelly's neglect, the railroad company would have been censurable. We hold that it is apparent from the respondent's own version of the accident and the condition of the engine appliances which, according to him, led to it, that he was to blame, in so far as human agency entered into the affair as a proximate cause.

If he did not have safe implements to work with and a safe place to work in, it was his own fault, or nobody's, so far as the testimony shows. If we accept the latter view, the case presented is a typical one for the defense of assumed risk. The doctrine of assumption of risk is of narrow range and application in our jurisprudence as it has been moulded in recent years by statutes and decisions. Public policy refuses to permit an employer to screen himself from the consequences of an injury his neglect inflicts on a servant, by saying the servant took the risk. Blanton v. Dold,109 Mo. 64; Curtis v. McNair, 173 Mo. 270; 1 Labbatt, Master & Servant, sec. 2. But an employee does assume the risk naturally incident to his occupation, including the risk of injury from defective machinery, after the master had used or-

dinary care and reasonable diligence to furnish safe machinery and to keep it safe, and, especially the risks incident to his own neglect; which, indeed everyone takes in every walk of life. Last citations above; Steinhauser v. Spraull, 127 Mo. 541; Fugler v. Bothe, 117 Mo. 475. As there is no evidence tending to prove any servant or agent of the railway company was guilty of a negligent act that was connected with the injury, unless the respondent was, it follows it was an incident of the respondent's employment and was assumed by him, as the risk was obvious.

The instructions given in this case in behalf of the respondent declared it was the appellant's absolute duty to furnish respondent safe appliances and a safe place to work, instead of declaring it was bound to exercise ordinary care to do so; but we have no occasion to take the instructions up and discuss them, as we hold there was no case for the jury.

The judgment is reversed. *Bland, P. J.*, and *Reyburn, J.*, concur.

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## HACKETT et al., Respondents, v. VAN FRANK, Appellant.

St. Louis Court of Appeals, March 1, 1904.

1. **PRINCIPAL AND AGENT: Authority of Agent: Question for Jury.** In an action of assumpsit for merchandise sold and delivered, where the question at issue is whether the one who ordered the goods on the defendant's credit, had authority to act as defendant's agent, or if not, whether the conduct of the defendant estopped him from denying the agency, or had ratified the acts of the alleged agent, the evidence is examined at length and held sufficient to justify a submission of the questions to the jury.

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2. ———: ———: **Incidental Powers.** If an agent have direct authority to bind his principal in a particular transaction, this direct authority will carry with it by implication of law such powers as are suitable and reasonably necessary to accomplish the intended purposes, though no incidental powers were mentioned between the principal and the agent.

3. ———: ———: **Ratification.** If a man, without right, assumes to act for another, the act will be attributed to, and affect the person represented if he acquiesces in and adopts it; and this, whether the actor was devoid of any authority, or went beyond an authority he had.

4. ———: ———: **Estoppel.** A man may be bound by an unauthorized and unratified act of a pretended agent, when his conduct induced some one to trust such pretending agent's assumed authority in matters which would entail a loss on the trusting party, if the one represented were permitted to deny responsibility.

5. ———: ———: **Circumstantial Evidence.** That an alleged principal knew what was done in his name by another, may be established by direct evidence, or by proof that it was done in a manner to warrant the inference that he knew of it.

6. ———: ———: **Implied Powers.** Where an agent had the management of a beer business for his principal, such agency did not give him the right to purchase whiskey in quantities on the defendant's credit, since that was not an authority commonly incident to such a business.

7. ———: ———: **Estoppel.** Where an agent acts beyond his authority, the principal he assumes to represent will be bound when the person dealt with had the right, in view of all the facts known to him, to believe he was dealing with an actual agent about a matter within the scope of the latter's authority, did believe it and rely upon it.

8. ———: ———: **Declarations of Agent.** The declarations of an agent as to the scope of his authority are not admissible in evidence against the person for whom he assumes to act, in the absence of proof that such person knew of them.

9. ———: ———: **Evidence: Instruction.** It was proper for one who sold merchandise, on the belief that an assumed agent of the supposed purchaser had authority to purchase, to testify that the goods were sold on the supposed principal's credit, but in such case the jury should have been instructed that the evidence should not be considered for the purpose of determining the issue of the agency, but only for the purpose of showing to whom the seller looked for payment.



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10. ———: ———: **Estoppel.** In an action for the price of a quantity of whiskey, sold and delivered by plaintiff on the defendant's credit, to one assuming to act as agent for the defendant, where the agent had the express authority to manage a beer business for the defendant, the fact that a license as a wholesale liquor dealer was issued to the defendant and posted up in the room where the beer business was conducted and where the whiskey so purchased was kept, is inadequate to estop the defendant from denying the assumed agent's authority.

11. ———: ———: ———. Neither is the fact that the tags on such whiskey barrels bore the defendant's name, sufficient to estop him from denying the agent's authority, where the plaintiff did not pretend that he was induced to sell the goods in controversy on account of the defendant's opportunity to see his name on the tags.

12. ———: ———: ———. Evidence that the defendant received a telegram from plaintiff in the presence of plaintiff's agent, and, in reply to a statement of the agent that the telegram meant that defendant should pay the plaintiff some money, the defendant gave an affirmative answer, was sufficient to sumit the question of estoppel to the jury as to goods sold after that date, but not as to goods sold before that date.

13. ———: ———: **Ratification.** In order to prove the actual authority of an agent, or ratification of assumed authority, it is not necessary to show that the circumstances tending to establish such authority, or assumed authority, were relied on by the party asserting it; but such circumstances must show that it was the intention of the party to be charged to authorize, or abide by, what was done.

14. ———: ———. In an action for the price of a quantity of whiskey purchased by an assumed agent of the defendant, where the agent's admitted authority was to conduct a beer business, the files of an action by the defendant to recover the price of the beer, sold by the alleged agent for him, were inadmissible in evidence.

Appeal from Madison Circuit Court.—*Hon. R. A. Anthony*, Judge.

Reversed and remanded.

*R. L. Wilson* and *W. H. Miller* for appellant.

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(1) A party can only become the agent by the will of the principal. Mechem on Agency, sec. 80. (2) Agency is either actual or ostensible, and is actual when the agent is really employed by the principal; and agency is ostensible when the principal intentionally causes a third person to believe another to be his agent who is not really employed by him. Mechem on Agency, sec. 4. (3) Whoever deals with an agent is put upon his guard by that very fact, and does so at his risk. It is his duty to inquire into and ascertain the nature and extent of the powers of the agent, and determine whether the act or contract about to be consummated comes within the province of the agency, and will or not bind the principal. Ignorance of the agent's authority is no excuse. The principal may be careless in reposing confidence in his agent, yet this does not make him liable to a third party, who in dealing with such agent, fails to exercise diligence. Mechem on Agency, sec. 289, note 2; Ib., sec. 298, note 2; Alexander v. Rollins, 14 Mo. App. 109. (4) To constitute an estoppel *in pais,* there must have been a false representation or concealment of material facts, made with the knowledge of such facts, to one who was ignorant of the truth of the matter with the intent that he should act upon it. Blodgett v. Perry, 97 Mo. 263. (5) Estoppel *in pais,* is a right arising from acts, admissions or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom it is alleged. Workman v. Wright, 31 Am. Rep. 546; Johnson-Brinkman Comm. Co. v. Railway, 126 Mo. 353; Acton v. Dooly, 74 Mo. 63; DeBerry v. Wheeler, 128 Mo. 84. (6) There was nothing in Van Frank's previous course of business to lead the traveling salesman to believe that Dunlop was his agent for the purpose of buying whiskey, brandy or vinous liquors. He was a dealer or jobber in beer. A party may have an agent authorized to buy rye, but that would not make the principal liable to a party who

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sold his agent wheat. 1 Parsons on Contracts (5 Ed.), 43, 44, 45; Wheeler v. McGuire; Mechem's Cases on Agency, 363; Anderson v. Volmer, 73 Mo. 403. (7) We insist that under the law and the evidence that defendant knew nothing of the purchase of the goods mentioned in plaintiff's petition, and at the time of the purchase, Dunlop was not the agent of defendant. And the purchase of Dunlop, under the representations made by him, was obtaining goods under false pretenses, and that was an act that the defendant could not ratify. McHugh v. County of Schuylkill, 5 Am. Rep. 445; Janis v. Roentgen, 52 Mo. App. 114; Shisler v. Vandike, 37 Am. Rep. 702; Summers v. Summers, 54 Mo. 345; McCoy v. Greene, 83 Mo. 626; Henry v. Heeb, Mechem's Cases on Agency, 115. The burden of proof of ratification rests upon the party alleging it. Mechem on the Law of Agency, sec. 132. There was no evidence that VanFrank shared the benefit of Dunlop's wrong doing. Consequently no *post facto* ratification. Ruggles v. Washington Co., 3 Mo. 496; Story on Agency, secs. 255 and 258; Ward v. Williams, 26 Ill. 451; Gold Mining Co. v. National Bank, 96 U. S. 640; Heyn v. O'Hagen, Mechem's Cases on Agency, 186. (8) The mere fact that Dunlop may have said he was the agent of appellant did not make him so. An agency can not be proven by the admissions or statements of a supposed agent. Such statements are mere hearsay. Salmon Falls Bank v. Leyser, 116 Mo. 68; National Bank of Commerce v. Morris, 125 Mo. 350; Diel v. Railway, 37 Mo. App. 457; Mitchim v. Dunlop, 98 Mo. 448; Waverly Timber & Iron Co. v. St. Louis Co., 112 Mo. 383. (9) The scope of an agent's authority can not be shown by his acts, when they have never come to the knowledge of the principal. The testimony of witnesses in relation to the sayings and acts of Dunlop should have been excluded. Alt v. Grosclose, 61 Mo. App. 409; Farrar v Cramer, 5 Mo. App. 167; Williams v. Edwards, 94 Mo. 447.

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*R. H. Whitelaw,* for respondent.

(1) An agent's appointment may be implied from the conduct of the parties. This being so, good faith is strenuously insisted upon and one, who by his conduct, has led an innocent party to rely upon the appearance of another's authority to act for him, will not be heard to deny the agency to that party's prejudice. Hence it is this, that in many cases the existence of an agency is implied or presumed from the words or conduct of the parties and this too, although the creation of an agency was not within their immediate contemplation. Mechem on Agency, sec. 82, et seq. It does not require direct evidence to establish an agency; for like any other fact it may be established by circumstances, the conduct of the parties and the relations previously existing between them. Hull v. Jones, 69 Mo. 587; Mitchim v. Dunlop, 98 Mo. 418; North v. Ollis, 61 Mo. App. 401; Mosby v. Commission Co., 91 App. 500. (2) And a party may be bound by the unauthorized act of another on the principle of estoppel as where he has placed such other in a position as to his property which was calculated to deceive others dealing with such person as apparent agent in reference thereto. Hoppe v. Saylor, 53 Mo. App. 4; Mechem on Agency, sec. 83, et seq. (3) The authority of an agent need not necessarily be proven by an express contract, but may be proven by the habit and course of business of the principal. Brooks v. Jamison, 55 Mo. 500. (4) Agency may be shown by proof that the alleged agent acted publicly and continuously about alleged principal's business with his knowledge and apparent consent. McGinnis v. Mitchell, 21 Mo. App. 493; Edwards v. Thomas, 66 Mo. 468. (5) It is a question for the jury to determine under proper instructions from the court, not only whether the agency exists, but if so what its nature and extent. Mechem on Agency, sec. 106; Barrett v. Railroad, 9 Mo. App. 226;

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Harrison v. Railway, 50 Mo. App. 333; Hoppe v. Saylor, 53 Mo. App. 4; Shewalter v. Railroad, 84 Mo. App. 389; Middleton v. Railway, 62 Mo. 579. (6) Where a party has so acted as to lead others to believe that a third party has authority to act as his agent, any loss which occurs through the acts of such third party should fall on him whose conduct caused the mistake. Rice v. Groffman, 56 Mo. 434. (7) Those dealing with an agent have the right to conclude that the principal intends the agent to have and exercise those powers only which necessarily belong to the character in which he holds himself out and this irrespective of any instructions or restrictions on his power. And this authority may be inferred from the agent's employment.

GOODE, J.—Assumpsit in the usual form for merchandise said to have been sold and delivered to the defendant. Plaintiffs are a firm of wholesale liquor dealers in the city of Louisville, Kentucky, and the merchandise sold was chiefly whiskey. The account consisted of three or four different sales made between June 23d and December 6, 1899. The liquors were consigned to the defendant at Cape Girardeau, Missouri. The points of controversy are whether F. H. Dunlop, the defendant's son-in-law, who ordered the goods on the defendant's credit and assuming to act as the defendant's agent, had authority to order them; or if not, whether the conduct of the defendant estops him from resisting payment on the score of Dunlop's want of authority.

The assignment of error to be disposed of first is that there was no evidence to go to the jury in support of either hypothesis of liability. The defendant is a man of advanced years, and, as we gather, a widower. Previous to 1899 he had given his daughter, Mrs. Dunlop, the Riverview Hotel in Cape Girardeau, and

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its furnishings; but early in 1899 the hotel was sold under a deed of trust put on it by Dunlop and his wife, and the defendant bought it, and likewise bought the furnishings at a private sale made by the assignee of Dunlop and wife, who had executed an assignment for the benefit or their creditors. The title to the hotel remained in Van Frank; but the Dunlops occupied it and he lived with them. In whose name the hotel business was conducted, the record leaves uncertain. Van Frank testified that about March, 1899, Dunlop desired to obtain the agency of the Anheuser-Busch Brewing Association for the sale of beer. The only arrangement that could be effected was for the defendant to guarantee payment for the beer, which he did. Afterwards, at Dunlop's solicitation, defendant consented to have the beer shipped to Cape Girardeau in his name, instead of Dunlop's, to facilitate the business. Thereafter, during 1899, the beer business, as defendant concedes, was conducted in his name by F. H. Dunlop, as agent; but he contends that the agency embraced nothing else. Dunlop, however, made some purchases of whiskey, including what was bought from the plaintiffs, as the agent of Van Frank and on the latter's credit. It was shown that he bought at least one bill from the Rothman Distilling Company. The only transactions with the plaintiffs were those covered by this suit; and they occurred between F. D. Sugg, a traveling salesman of the plaintiffs, and Dunlop, who gave Sugg orders for the liquor in Van Frank's name and they were sold and shipped on the latter's credit, after an investigation of his financial standing. The beer business Dunlop managed was a wholesale one, and was carried on in a room of the basement of the Riverview Hotel, where cases and kegs of beer and the barrels of whiskey afterwards purchased were kept, and were visible to anyone who entered the room, as Van Frank occasionally did. On August 3, 1899, a license as wholesale liquor dealer was issued in Van

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Frank's name by the United States collector. Dunlop procured this license, Van Frank says, without his knowledge or consent; but the license certificate was posted in plain view in the room where the liquors were kept and was observed by Sugg. It was also proven that ten or twelve barrels of whiskey were on the floor of the ware room at one time, with shipping tags on them bearing Van Frank's name; thus showing the whiskey had been shipped to him. These labels could be read by anyone whose attention they attracted; but Van Frank testified he never noticed his name on them. Another circumstance relied on to show he had knowledge the goods in controversy were purchased in his name was that one day in November, 1899, he got a telegram from the plaintiffs and opened it in the presence of Sugg, saying: "This is a message from those Greenbrier people," and asking what it meant. Sugg replied: "It means for you people to pay us some money;" to which Van Frank answered, "Yes." It was also shown that the city of Cape Girardeau had issued a merchant's license to F. H. Dunlop, agent.

The above is a summary of the facts which are said to have been for the jury's consideration as going to establish an actual or ostensible authority in Dunlop to make the purchases; and we think they were sufficient for that purpose. The incident of the telegram, which probably requested Van Frank to pay for some of the whiskey, or, if it did not, led Sugg to tell him that the plaintiffs wanted him to pay them, and Van Frank to assent to Sugg's remark, was evidence that the former recognized a responsibility for Dunlop's purchases and ratified, if he had not previously authorized, them. Moreover, some of the goods were bought afterwards, and as Van Frank made no protest then against being regarded as responsible, his behavior may have induced Sugg to believe Dunlop had not acted without authority. There was testimony, too, that the whiskey was billed to Van Frank and that the

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plaintiffs addressed some correspondence to him about it. Of course, all those things could have happened without Van Frank's knowledge or complicity. They are consistent with the view that he did not know the whiskey had been bought on his credit until he was apprised of the truth by the first suit against him, which was brought by the Rothmann Distilling Company. Still, as he was aware that his son-in-law was insolvent, and had made an assignment for the benefit of his creditors and that the hotel had been sold under a deed of trust, he must have been aware that Dunlop had no commercial standing; and it strikes one as somewhat improbable that he made no inquiry as to how such a large quantity of whiskey as he saw in the ware room, was procured. On the other hand, Sugg never asked Van-Frank about Dunlop's authority, which is a noticeable fact, too. On the whole, we think the case was for the jury to decide.

We will next examine the errors assigned because of the admission of certain evidence and the rulings on the requests for instructions; and in treating the questions presented by those assignments, it will be convenient to premise some observations of a general nature in regard to proving an agency and the scope of the authority that accompanies it. An agent may possess direct authority to bind his principal in a particular transaction; that is to say, the principal may expressly empower the agent to bind him; and this direct authority will carry with it, by inplication of law, such powers as are suitable and reasonably necessary to accomplish the intended purpose, though no secondary or incidental powers were mentioned between the principal and the agent. Then, too, the custom of business will commonly endow an agent appointed to a position of trust, as, for example, the cashier of a bank, or to transact an affair, like the adjustment of an insurance loss, with all the authorities agents of the kind usually have; and the appointee's acts, within the scope of the

customary authorities, will bind the principal unless he imposed restrictions which were known to the party dealt with. All the implied powers attributed by law to an agent, whether as necessary to the efficient discharge of his main duty, or as habitually exercised by persons discharging such a duty, have the effect of authorities actually conferred, though in fact they were not. If a man, without right, assumes to act for another, the act will be attributed to and affect the person represented if he acquiesces in and adopts it; and this whether the actor was devoid of any authority, or went beyond an authority he had. And, by the law of estoppel, a man may be bound by an unauthorized and unratified act. This consequence ensues when the conduct of the represented party induced some one to trust the pretending agent's assumed authority in matters which would entail a loss on the trusting party, if the one represented were permitted to deny responsibility. An estoppel may be raised because the supposed principal intentionally held the actor out to the public as an agent possessed of the authority he assumed; or permitted the actor to hold himself out in that way; or, by negligent conduct, created a false impression respecting the actor's authority; or negligently failed to correct such an impression created by the actor himself, when the principal ought, in reason, to have known it was likely to entrap some one. The essence of the estoppel is that the party asserting the agency was deceived by the conduct of the party against whom it is asserted; and though fraud may be an ingredient of the case, it is not essential. The estoppel may be allowed on the score of negligent fault, on the principle that where one of two innocent persons must suffer loss, the loss will be visited on him whose conduct brought about the situation. Of course, if a man presents some one to the public as his agent, whom he in fact has not appointed, and on that score afterwards denies responsibility for the pretended agent's acts,

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the defense is highly fraudulent; as it is, too, if a man denies responsibility after advisedly permitting another to represent him, when no appointment had been made, or beyond the scope of the appointment. That a man knew what was done in his name by another may be established by direct evidence, or by proof that it was done in a manner to warrant the inference that the party represented knew of it. 2 Herman Estoppel, p. 1207. We believe these are all the predicaments in which a person is liable, by the law of agency, for the acts of another. They have been stated in this elementary form for the purpose of ascertaining if any of them makes Van Frank answerable for the price of plaintiff's goods. Some of them may be excluded from further consideration; for it is obvious that they are inapplicable to the facts in evidence. The only agency it is certain Dunlop held was the management of the beer business. But to accomplish the object of that agency, it was not necessary for him to buy whiskey. Neither did the usage of affairs give him the right to purchase whiskey in quantities on the defendant's credit, as an authority commonly incident to such a business. The defendant was not to be held liable, therefore, because of any implied powers in Dunlop, and the court below properly omitted that hypothesis in instructing the jury.

Granting, for the moment, that Dunlop's purchases from plaintiffs were unknown to the defendant when made, and were never in any way ratified, we will inquire whether the defendant is bound to pay for them because his conduct or behavior estops him from denying Dunlop's authority. We may supplement what is said above in regard to the power of a pretending agent, or a true agent acting beyond his authority, to bind the party he assumes to represent, by stating the law of such a contingency in a different form and as follows: The principal will be bound when the person dealt with had the right, in view of all the facts known to him, to be

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lieve he was dealing with an actual agent about a matter within the scope of the latter's authority. Heffernan v. Boettler, 87 Mo. App. 317; Walsh v. Ins. Co., 73 N. Y. 1; Ruggles v. Ins. Co., 114 N. Y. 215; Askel v. Starbird, 152 Mass. 120. That is to say when a plaintiff's case hinges on an apparent, instead of a real authority, he must show that the defendant's conduct, whether it was so intended or not, was adapted to and did mislead the plaintiff into believing the apparent authority was real, and, so believing, to rely on it.

Our examination of the conduct of Van Frank, for the purpose of detecting acts which will estop him to deny the right of Dunlop to buy the liquors in controversy in the former's name and on his credit, has disclosed no fact to which the plaintiffs can appeal for an estoppel, except those we will immediately mention.

Dunlop said he had authority; but his declarations to that effect were hearsay and incompetent; as there was no proof that defendant knew of them and a man is not to be affected by someone's unknown assumption of the character of his agent. Diel v. Railroad, 37 Mo. App. 454; Bank of Commerce v. Morris, 125 Mo. 343. Sugg was permitted to testify as to what Dunlop told him regarding the alleged agency; but the evidence should have been excluded. It was proper for him to testify that the goods were sold on the defendant's credit, and on the supposition that Dunlop ordered them by right, for the purpose of showing to whom the plaintiffs were willing to sell and believed they were selling. To prove Dunlop's right or plaintiffs' grounds for believing in it, his declarations were inadmissible. They were not only admitted, but a requested instruction that the jury should disregard them in determining the issue of agency was refused. If it was necessary to let Sugg tell what Dunlop said to him, in order to show to whom the plaintiff's looked for payment when they sold the goods, the effect of the statement should have been con-

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trolled by advising the jury that they should not be considered for any other purpose.

No influence can be attributed to the city and the federal licenses standing in Van Frank's name. Sugg never saw the city license, and had already sold two bills of goods in June and July, before the government license was issued. Defendant can not be estopped to deny the agency by such incidents. The essence of any equitable estoppel is a mistaken belief of facts, engendered by another person's misconduct; and an estoppel of that character is usually allowed in cases like this, when a man held another out, or knowingly permitted another to hold himself out, as an agent; or where there were previous dealings of a sort to produce an impression that the relation of principal and agent existed and that the agent's authority covered the controverted act. One must not stand by and permit a man to contract for him or he will be obligated. The principle of that rule of law is sound; but its application to a controversy depends on the facts proven; and that the licenses were in the defendant's name is a fact inadequate to estop the defendant from denying Dunlop's agency. For an enunciation of the law on this subject, consistent with what we have said, we refer the reader to 2 Herman, Estoppel, secs. 944 to 947, inclusive, and the cases cited. Suppose Van Frank knew the licenses were in his name; was he thereby warned that Dunlop would assume, without authority, to buy large quantities of whisky on his (defendant's) credit, or that anybody would be entrapped by the circumstance of the licenses, into taking Dunlop's agency for granted, when by an easy inquiry the truth could be indubitably ascertained? Sugg's only excuse for saying nothing to the defendant about the purchases, or Dunlop's agency, is that every wholesale house has a buyer and he felt that he had no business with anyone but the buyer, Dunlop, thus begging the question at issue; which is as to whether Dunlop

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had been appointed buyer by Van Frank, or falsely said he had.

The shipping tags on the barrels of whiskey in the ware-room bore Van Frank's name, thus showing the whiskey had been consigned to him, and stress is laid on the circumstance. We may allow that it was for the jury to say whether the defendant noticed the tags. But Sugg did not pretend he was induced to sell any of the goods in controversy by defendant's opportunity to see his name on the whiskey barrels. He must have sold some of the whiskey before the defendant had an opportunity to do so; for they were on barrels containing plaintiff's goods. No circumstance can work an estoppel which the party claiming the estoppel was not misled by and did not rely on; and on such an issue he must bring forward proof. There is no proof that Sugg's sales were influenced by observing that the defendant had an opportunity to read his name on barrels of whiskey, and said nothing about the matter. The argument for an estoppel on this ground is untenable.

The remaining fact urged to estop Van Frank, was his behavior when he got the telegram; and while, to our minds, the incident is inconclusive, it was probably evidence for the jury on the issue of estoppel. But all the goods, except the bill of December 6th, had been sold prior to that occurrence; which bears therefore, only on the subsequent sale of December 6th.

The fact that the licenses and labels were in the defendant's name, the testimony that the goods were billed to him and letters written to him about them, that he was frequently in the room where the liquors were, and other circumstances in proof, while they do not preclude the defendant from denying Dunlop's agency, inasmuch as the plaintiffs did not rely on them, have a tendency to prove Dunlop was authorized in advance to use defendant's credit, or that his doing so was ratified by defendant's acquiesence after knowledge of the fact. If the defendant learned that Dunlop had bought whis-

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key in his name and raised no objection, but kept the goods, he adopted and ratified the purchases. Original authority or subsequent ratification may be shown by direct or indirect evidence; that is, by positive testimony or by relevant circumstances. And while the circumstances relied on to create an agency by estoppel must be proven to have been known to and relied on by the party asserting the estoppel, this is not the rule when they are counted on to establish actual authority or ratification; for then the essence of the matter is the intention of the party to be charged, to authorize or abide by what was done; not that the third party believed, on sufficient grounds, that it had been authorized. Bonner v. Linsenby, 86 Mo. App. 666; Heffernan v. Boettler, supra. It was not positively shown that Van Frank knew in advance the liquors were to be bought on his credit; or that he knew they had been, until he was first sued. But it was a fair question for the jury whether he did or not, if we take account of the fact that he lived at the hotel, was frequently about the ware-room, must have seen the large quantity of whiskey in there, knew of his son-in-law's recent failure in business and total insolvency, and that the wholesale license was before his eyes. All those things go to prove he either authorized Dunlop to make the purchases in question, or acquiesced in them after they were made.

The court admitted in evidence the files of an action by Van Frank to recover the price of some beer, sold by Dunlop, as agent, against John H. Cooper, who conducted a bar in Cape Girardeau. The purpose of this evidence was, apparently to show that Van Frank recognized Dunlop's agency; but as the suit related solely to a sale of beer, and as Dunlop's agency in the beer business was admitted, we think those papers should have been excluded. The deposition of Greame McGowan was admitted, over the objection of the defendant, but afterwards excluded. Some parts of it seem to

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be competent, while others are not, and the incompetent parts may well be excluded on a second trial before they are read to the jury. We refer to McGowan's statement that the goods in controversy were sold to Van Frank; which was evidently hearsay, as the witness had no knowledge of the facts except as he learned them from Sugg.

The case should be submitted to the jury to decide these issues. First, whether Dunlop had authority to make the purchases in Van Frank's name. If he had actual authority, the liability of the defendant follows without reference to any other issue. Second, whether, if he did not have authority at the time they were made, the defendant afterwards learned they had been made in his name and acquiesced in Dunlop's action, thereby ratifying it. In either of those two contingencies the jury are not concerned with the question of estoppel. Third, if Dunlop's acts are found to have been neither authorized nor ratified by the defendant, whether the latter's behavior when he got the telegram induced Sugg to believe Dunlop had acted with authority and so believing, to make the sale on December 6th. We are thus explicit because this is a case in which there is much danger of an unjust result, unless it is tried cautiously and the jury's attention drawn directly to the facts by close instructions. Abstract announcements of legal principles should be avoided.

The circumstance of Van Frank's relationship to Dunlop and the latter's admitted agency in respect to the beer business, were adapted to suggest a wider agency; though the defendant may have been innocent of creating it, or doing anything to inspire a belief that he had. On the other hand, it was possible for the defendant to present a plausible but false theory that he knew nothing of Dunlop's conduct when he, in fact, knew and had authorized it.

The judgment is reversed and the cause remanded. *Bland, P. J.*, and *Reyburn, J.*, concur.

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## NICHOLS et al., Appellants, v. LAPPIN, Respondent.

**St. Louis Court of Appeals, March 1, 1904.**

1. **MORTGAGES AND DEEDS OF TRUST: Landlord and Tenant: Foreclosure.** Under section 4355, Revised Statutes of 1899, a tenant who has a growing crop on premises, sold under a power contained in a mortgage or deed of trust, is not affected as to his interest in such crop.

2. ——: ——: ——. But it is doubtful if such protection is afforded to a tenant against a purchaser who acquires title at a foreclosure by a judicial decree.

3. ——: ——: ——. Where premises were sold under the power in a deed of trust and afterwards, at the suit of the mortgagor, the sale was set aside and a time fixed for redemption by the mortgagor, but the mortgagor failed to redeem and the premises were again sold by the sheriff under the decree, the purchaser at such sale acquired title to the crop growing on the premises at the time, as against a tenant who leased the premises after the first foreclosure sale.

Appeal from Greene Circuit Court.—*Hon. J. T. Neville*, Judge.

REVERSED AND REMANDED.

*Hamlin & Mason* for appellant.

Revised Statutes 1899, sec. 4355. We contend that the evidence in this case wholly fails to establish a tenancy between George and Lorin Lappin. And further, that although a tenancy was established, yet Lorin rented the premises with notice, and we claim that that section applies to tenants without notice.

*Wright Bros. & Blair* and *White & McCammon* for respondent.



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As to the legal question raised relative to section 4355 and appellants' contention that this section applies only to tenants "without notice" we most respectfully submit that such a construction of the statute is not consistent with its continued existence. For notice is presumed from the fact of recording, and an unrecorded instrument would not affect any one, even without the protective influence of the section cited. If, therefore, the statute can not help the tenant when the mortgage is recorded and he does not need its aid when it is not recorded, what reason has this section to assign for cumbering the statute books?

GOODE, J.—The purpose of this suit was to have the defendant enjoined from gathering and removing two-thirds of a crop of corn from 28 acres of land in Greene county. That tract was part of a farm of 320 acres formerly owned by the defendant's father George Lappin, who, with his wife Mollie, gave a deed of trust on it July 14, 1900, to Jacob Krieder, trustee, for the benefit of the plaintiff, the Nichols & Sheppard Company, a corporation, and to secure the payment to that company of three promissory notes for $725 each, executed by the grantors George and Mollie Lappin and by this defendant, who, however, was not a party to the deed of trust. On default in payment of the notes, the trustee advertised the land and sold it March 23, 1901, under the power that the deed conferred on him, the purchaser being one of the plaintiffs, E. C. Nichols, to whom a deed for the land was executed by the trustee on that day. George and Mollie Lappin afterwards brought suit in the circuit court of Greene county against the present plaintiffs to have the trustee's sale set aside. That suit proceeded to a judgment during the January term, 1902, to-wit, on April 19, 1902, by which the sale was set aside and George and Mollie Lappin permitted to redeem the land by paying what they owed on the

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notes and all costs, on or before June 7, 1902. It was further adjudged that if they failed to pay those sums by the date fixed, the sheriff of Greene county should sell the real estate under a special execution, execute a proper deed to the purchaser and place him in possession of the premises. In the spring of 1902, at just what date was not shown, but, by fair inference, prior to the date of said judgment—that is, prior to April 19th—George Lappin leased the tract on which grew the corn in controversy, to his son Lorin, who planted and raised the crop. His parents failed to redeem their farm on or before June 7th, as the judgment in their favor provided they might, and the sheriff, pursuant to the judgment, advertised it under a special execution August 12, 1902, when it was again bought by E. C. Nichols. In October, George and Lorin Lappin began to gather Lorin's share of the corn crop and put it in the crib. His share was two-thirds of the crop; the other third went to his father for the rent.

This action was instituted to restrain Lorin Lappin from removing the corn and at the same time another action was instituted against George and Mollie Lappin to restrain them. A temporary injunction was granted; but, on the final hearing, was dissolved and the plaintiffs appealed.

As to the contention that the defendant's tenancy was fictitious and trumped up to defraud the plaintiffs, we answer that the evidence to prove that the parcel of ground on which the corn in dispute grew, had been leased by George Lappin to the defendant, is not so weak that we are willing to discard the finding of the court below and hold no leasing was established.

That the growing crop of corn became the property of the plaintiff, E. C. Nichols, as purchaser at the foreclosure sale, unless it was saved to the defendant as tenant by virtue of section 4355 of the Revised Statutes, is conceded. The section reads as follows:

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"All mortgages of real or personal property, or both, with powers of sale in the mortgagee, and all sales made by such mortgagee, or his personal representatives, in pursuance of the provisions of such mortgages, shall be valid and binding by the laws of this State upon the mortgagors, and all persons claiming under them, and shall forever foreclose all right and equity of redemption of the property so sold: Provided, that nothing herein shall be construed to affect in any way the rights of a tenant to the growing and unharvested crops on lands foreclosed as aforesaid, to the extent of the interest of such tenant under the terms of contract or lease between such tenant and the said mortgagor or his personal representatives."

Prior to the enactment in 1893 of the proviso to that statute, it was settled law in this State, as it is in most, that a purchaser at a sale foreclosing a mortgage or deed of trust, whether the sale was under a power conferred in the instrument or by virtue of a judicial decree, acquired the growing crops as against a tenant holding under a lease of later date than the incumbrance. Reed v. Swan, 73 Mo. 100; Haydon v. Burkemper, 101 Mo. 644. The proviso was appended to the above statute to protect tenants who happen to have growing crops when a foreclosure sale occurs, against losing the proceeds of their labor. Although the statute mentions nothing but mortgages with a power of sale, it has been extended, by reasonable and fair construction, to deeds of trust. Wells v. Bente, 86 Mo. App. 264. It is a benign law and ought to be given as wide scope as may be, consistently with its terms. But there is grave doubt whether it can be made to protect a tenant against a purchaser of the title at a foreclosure by judicial decree, without going beyond any intention of the legislature to be collected from or consistent with the language used. To extend it over such foreclosures, might enlarge its remedial influence and diminish the

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mischief to be obviated; but its terms may be argued with much cogency to forbid that interpretation. The deed of trust on the Lappin farm was not foreclosed finally by virtue of the power of sale contained in the instrument. The statute invoked by the defendant says that all mortgages of real or personal property, with power of sale in the mortgagees, and all sales made by such mortgagees or their personal representatives, *in pursuance of the provision of such mortgages,* shall be valid and binding upon the mortgagors and persons claiming under them. The proviso says that the foregoing clause shall not be construed to affect the rights of a tenant to growing and unharvested crops on the land *foreclosed as aforesaid.* Whether the language of the statute excludes from its efficacy foreclosures by decree of court, may be postponed until some case exacts a decision of the point. In our judgment the facts of this case take it out of the operation of the statute, even if it embraces such foreclosures.

The defendant took a lease from his father early in the spring of 1902, and probably before the sale by the trustee in the deed of trust and the trustee's deed executed pursuant to that sale had been set aside. If he attempted to lease under those circumstances he acquired by the transaction, no rights under the statute in question as against Nichols; for the latter held the title at the time instead of the lessor, George Lappin; and, manifestly, the law does not intend to protect a tenant who leases from a mortgagor after foreclosure. But the trustee's sale and deed were set aside; and thereby the defendant would have been brought within the operation of the statute, if the decree had simply vacated those acts as nullities. But it did more: it fixed a period in which the mortgagees George and Mollie Lappin might redeem the land by paying their debt, and ordered the sheriff to sell it under a special execution if not redeemed in that time, and to put the

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purchaser at such sale in possession. Now if the defendant had planted corn before this decree was rendered, he did so while the title was out of his lessor and in the plaintiff, Nichols. If he planted afterwards, he did so in the face of the order making the mortgagor's equity of redemption expire June 7, 1902, and long before a corn crop could mature. Of all these facts he had knowledge when he leased the land and planted the crop. The law is that a person who buys or otherwise obtains an interest in property (except commercial paper) while it is in litigation, acquires his interest subject to the result of the litigation. Buford v. Packet Co., 3 Mo. App. 159; Burnham v. Smith, 82 Mo. App. 35. For reasons at least as strong, if one, who is apprised of the fact, acquires an interest in property already affected by a judgment, he is bound by the judgment.

We think the statute does not interfere with that principle or help a tenant who leases land and puts in a crop with such facts before his eyes. Independently of a statute like ours, one who plants a crop on land after judgment of foreclosure, but before sale, loses the crop if the foreclosure sale occurs while it is standing. Goodwin v. Smith, 49 Kas. 351; Beckman v. Sykes, 35 Kas. 120; Jones v. Adams, 37 Ore. 473; Mo. Valley L. Ins. Co. v. Keihl, 25 Kas. 390. There are decisions to the contrary in Ohio under a statute of that State, and in Nebraska, which adopted the Ohio statute and followed its home construction. But the other doctrine is generally prevalent and is the only one consistent with the law as it stood in this State prior to the enactment of the proviso in question; which was that the growing crops belonged to the purchaser at a foreclosure sale. To our minds it is illogical that an act purporting to protect tenants from losing crops grown on incumbered lands in the event of foreclosure sales, should protect a tenant who plants a crop after a sale has occurred

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and during a redemption period which must expire before his crop matures. It would scarcely be contended that if a mortgagor, after default in payment and after notice of sale under the terms of the mortgage, but before sale, should lease the premises to a tenant who knew the facts, the latter would have the benefit of the statute. That contention would enable the mortgagor to enjoy the proceeds of the incumbered land months after he had lost the title and the right to possession; for he might lease for cash instead of a share of the crop, as was done in the present instance. The decree in the suit by the mortgagors not only ordered the sheriff to sell if the debt was not paid by June 7th, but also ordered him to give the buyer possession. The latter order was inconsistent with a right in the defendant to hold the premises until the corn matured and then gather it; and as he leased pending the litigation, and perhaps after the decree, his right as tenant was subordinate to plaintiff's rights under the decree. The judgment in this case is, therefore, reversed and the cause remanded in order that the plaintiffs may be granted a relief by a permanent injunction. *Bland, P. J.*, and *Reyburn, J.*, concur.

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## CONNALLY, Administrator, Estate of SHELTON, Appellant, v. PEHLE, Respondent.

**St. Louis Court of Appeals, March 1, 1904.**

1. **NEW TRIAL: Grounds Stated in Order: Appellate Practice.** The burden is on the respondent, in the appellate court, to show that a motion for new trial was properly sustained upon any ground other than that designated in the order of the trial court awarding it, from which the appeal was taken; and, in the absence of such showing, the appellate court will be confined to the consideration of the cause mentioned in the order. (Reyburn, J.)

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2. ———: **Surprise.** A new trial should not be awarded on the ground of surprise, where the surprise claimed is due to the least want of diligence; and upon the record in this case the order of the trial court granting it should be set aside. (**Reyburn, J.**)

**Majority Opinion.**

3. ———: **Newly Discovered Evidence.** The majority of the court are of the opinion that the newly discovered evidence, upon which the new trial was asked, showed the account upon which judgment was rendered had been paid by respondent, that he was not negligent, and that the trial court did not abuse its discretion in awarding the new trial which manifestly makes for justice. (**Per Curiam.**)

Appeal from Franklin Circuit Court—*Hon. W. A. Davidson,* Judge.

AFFIRMED.

*James Booth* for appellant.

(1) A new trial should not be granted to a party upon that ground that he was mistaken as to the nature of his case or as to what his witnesses would swear. Robins v. Ins. Co., 12 Mo. 380. Surprise caused by the laches of party never afford ground for new trial. Tittman v. Thornton, 107 Mo. 500. (2) If there is any element of negligence, there can be no surprise. Fretwell v. Laffoon, 77 Mo. 26; Peers v. Davis, 29 Mo. 184. Parties can not claim to be surprised by the testimony of their own witnesses, when they have not sought to learn what such testimony would be. Oconnor v. Duff, 30 Mo. 395. (3) It must appear that the parties made proper effort to refresh the minds of their witnesses. Howell v. Howell, 37 Mo. 124. (4) If parties are surprised at evidence given on the trial, they must at once make such surprise known to the court and ask for a postponement of the trial, to enable them to procure additional evidence, if they desire to introduce further evidence on that branch of the case. Bragg v. Moberly,

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17 Mo. App. 221; Albert v. Seiler, 31 Mo. App. 247; Winn v. Reed, 91 Mo. App. 621; James v. Mutual Association, 148 Mo. 1. (5) The sole question to be determined is whether or not the court ought to have sustained the motion on the grounds stated in the record. Milling Co. v. White Line, etc., 122 Mo. 258; Bradley v. Reppel, 133 Mo. 545; Hewit v. Steel, 118 Mo. 463; Bank v. Wood, 124 Mo. 72; Omearra v. Swanson, 62 Mo. App. 71; Candee v. Railroad, 130 Mo. 142. (6) Granting motion on one ground overrules all others. Ittner v. Hughes, 133 Mo. 679; Miller v. Madison Car Co., 130 Mo. 517; 140 Mo. 319.

*Oscar E. Meyersieck* for respondent.

(1) The statute authorizes verdicts to be set aside and new trial granted "where there has been a mistake or surprise of a party, his agent or attorney." Revised Statutes 1899, sec. 800. (2) Surprise means an "unforeseen disappointment in some reasonable expectation" against which ordinary prudence would not have afforded protection. Peers v. Davis, 29 Mo. 184. (3) The granting of new trials is discretionary with trial courts, and unless it clearly appears that this discretion is grossly abused, appellate courts will not interfere. Bank v. Armstrong, 92 Mo. 265; McCullough v. Ins. Co., 113 Mo. 606; McKay v. Underwood, 47 Mo. 187. And the burden of showing that the trial court abused its discretion is on the appellant. Ittner v. Hughes, 133 Mo. 679. (4) If the motion was correctly sustained on any ground assigned in the motion the judgment of the lower court should be affirmed. Rush v. Armstrong, 92 Mo. 265; Hewit v. Steele, 118 Mo. 463.

STATEMENT.

This, an action upon an account, was brought by plaintiff as administrator of W. L. Shelton against de-

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fendant, before a justice of the peace at New Haven, Missouri, and appealed by appellant herein to the circuit court of Franklin county, where a trial by jury resulted in verdict for plaintiff for amount of claim, and from an order sustaining motion for new trial, the latter has appealed to this court. At the trial *de novo,* plaintiff established a prima facie case, and defendant testified in his own behalf, identifying a receipt given him by G. G. Frentrop consisting of a bill setting out the items of the account in suit, bearing date March 26, 1900, which was introduced. Defendant, continuing his testimony, stated he could not remember when he paid it except by date thereon. On cross-examination he deposed that he did not dispute the account, and would not say whether the date on the receipt was correct or not, and that he did not know whether he paid it before or after the death of Shelton. Frentrop testified to his management of the business of deceased and dealings with defendant: that the receipt tendered in evidence was a bill rendered by witness in his handwriting and showed receipt of payment, and upon cross-examination added he could not say positively whether the date upon the receipt was correct or not, but denied having stated to a witness, who so testified subsequently in rebuttal, that he, Frentrop, had said the date upon the receipt was incorrect, and that witness had dated it back: that he was talking to such rebutting witness about another bill, a bill for lumber; that defendant had paid the bill in suit to Shelton by check, and the latter had witness' receipt for it, and defendant would find such check if he made search, and that he did not know where the other bill was. As already alluded to, in rebuttal, a witness testified that he had asked Frentrop regarding the receipt and when defendant paid, and that he replied that defendant paid the bill after Shelton's death, and he dated the receipt back, but on the witness stand at trial before the justice, Frentrop swore

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he did not know when he gave the receipt, but nothing was then said about two accounts or any payment by a check and this rebutting witness said he was speaking about the account in suit, the only one in which he was interested. Another witness for plaintiff, recalled in rebuttal, testified that he had overheard Frentrop say at New Haven, that he dated the receipt back, and there had been no question about another bill till the day of trial in the circuit court. The trial proceeded to a close and after verdict for plaintiff, defendant filed a motion for new trial containing the following ground:

"Because at the trial of said cause, the defendant himself and his counsel were surprised by the testimony of G. G. Frentrop to the effect that defendant had paid him after the death of said Shelton $14.85 in payment of lumber account for lumber he sold and delivered to defendant out of the lumber yard of said Shelton; that defendant and his counsel were also surprised by the testimony of said Frentrop to the effect that defendant paid to said Shelton, April 17, 1900, $14.83 by check in payment of the account sued on read in evidence and that said Shelton directed him as agent to give defendant receipt for account sued on; that as a matter of fact the testimony of said Frentrop given as aforesaid, is true, except that he called the draft hereto attached a check," and accompanied it by affidavits as follows:

"Now comes F. W. Pehle who first being duly sworn upon his oath says, that since the trial of the above named cause he has discovered that during the lifetime of W. L. Shelton, to-wit, between the fourteenth and seventeenth day of April, 1900, he paid the account here sued on by draft drawn by the Bank of Union on the Franklin Bank, St. Louis, payable to F. W. Pehle, Coll., for the sum of $14.83 which said draft said defendant indorsed and delivered to said Shelton or to his agent, G. G. Frentrop, on which draft said Shelton received and collected said sum of $14.83, on or

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about the seventeenth day of April, 1900, in payment of the account sued on in this case.

"That said evidence has come to the knowledge of the defendant since the trial of this cause, and that it was not owing to a want of due diligence that said evidence did not come to his knowledge sooner.

"That said draft whereby said debt was paid has ever since the time of its issue and payment been in the possession of the Bank of Union, and without the knowledge of the defendant. That said draft is the same draft as the one attached to this motion and marked exhibit 'A', to the surprise of the said defendant. That the signature of the said F. W. Pehle, Coll., on the reverse side of said draft is the genuine signature of said defendant, and that the indorsement, 'W. L. Shelton, G. G. Frentrop,' is in the handwriting of G. G. Frentrop, agent of said Shelton.

"That the defendant did not know these facts at the time of the trial of this case and was greatly surprised at the testimony of G. G. Frentrop that there were two accounts, one of which, viz., the one here sued on, having been paid by a check during the lifetime of said Shelton, but that he has since discovered that there were in fact two accounts and that he in fact paid the account here sued on by the draft as above detailed. That the account above mentioned and not paid by draft, was for the sum of $13.90, which sum is so near the amount of the account sued on, and that said account was paid at so near the same time as this account that the defendant was misled thereby, and believed that there was but one account.

"Said F. W. Pehle further says that he was present at the trial of this case in the justice court and heard the testimony of G. G. Frentrop in that court, to the effect that the account sued on was paid to him in cash at or about the time of the taking of the inventory, and that he did not testify then that there were two accounts,

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nor that this account was paid by check or draft, and so said defendant was surprised at the testimony of Frentrop as well as at the fact that there were in fact two accounts and that the account sued on was paid by the draft above mentioned. Said defendant further says that he believes the newly discovered evidence above mentioned will upon a new trial change the verdict of the jury.

"And this affiant further says that at and prior to the fourteenth day of April, 1900, he resided in the city of Union in said county and was engaged in his official duties as collector of said county, and during all said times bought seven or eight divers lots of lumber from said W. L. Shelton, from his lumber yard in New Haven, Missouri, which said lots of lumber were delivered by the agent of said Shelton to divers agents of this affiant, so that this affiant was not in a position at and before the trial of this cause to know all the facts touching the payment of said several accounts."

"This affiant, A. W. Hoffman, of lawful age, first being duly sworn on his oath says that he resides in the city of Union, in the county and State aforesaid; that he is the duly qualified and acting cashier in charge of the Bank of Union, a banking corporation, doing a general banking business in said city of Union in said county and State aforesaid; that the draft marked exhibit 'A' hereto attached and also to the motion for a new trial in the cause of M. T. Connally, administrator of the estate of W. L. Shelton, deceased, v. F. W. Pehle, was issued by said Bank of Union on the fourteenth day of April, 1900, drawn on the Franklin Bank at St. Louis for the sum of $14.83, payable to F. W. Pehle, collector, and that the indorsement thereon purporting to be the indorsement of said Pehle according to affiant's best knowledge and belief is the signature of said F. W. Pehle, and in the handwriting of said Pehle, and that said F. W. Pehle did considerable business with said

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Bank of Union and that affiant is acquainted with his signature; that the stamps on the back of said draft indicate that said draft was paid and passed through the Bank of New Haven, at New Haven, Missouri, and through the St. Louis Clearing House at St. Louis, Missouri, on and before the 27th day of April, 1900, and next after the same had been paid to the indorsee of Pehle, to-wit, W. L. Shelton, and that said draft has been in the possession of said Bank of Union since shortly after said twenty-seventh day of April, 1900, until the fourteenth day of March, 1903.

"That this affiant is now and has for more than five years been cashier of said Bank of Union; that said draft was issued as aforesaid by said bank through him acting in said capacity and that this affiant, if called as a witness, will testify to the foregoing facts on a trial of said cause."

"This affiant, Jesse H. Schaper, of lawful age, first being duly sworn on his oath, states that he did not testify as a witness upon the trial of the case of M. T. Connally, administrator of the estate of W. L. Shelton, deceased, plaintiff, v. F. W. Pehle, defendant, in this court; that this affiant was the counsel for, and as such represented the said defendant in the trial of said cause before the justice of the peace in the city of New Haven, in Franklin county, Missouri, on the twenty-second day of November, 1902, which trial resulted in a verdict and judgment for the defendant and that at said trial before the justice, one G. G. Frentrop testified as a witness to facts material to the issues in said cause, in the presence and hearing of affiant to the effect that he, said G. G. Frentrop, was the agent of W. L. Shelton up to the time of latter's death and as such agent was in charge of the lumber business of said W. L. Shelton in New Haven, acting as salesman, keeping the book accounts thereof, and receiving and paying out moneys for said Shelton; and that among other matters testified to by said Fren-

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trop, this affiant recollects that said Frentrop testified in substance that his (Frentrop's) best recollection was that F. W. Pehle paid him as agent of said Shelton $14.83 in payment of the account sued on the above case shortly before the date of the death of said W. L. Shelton; could not give the exact date but thought the date of the receipt given by him to said Pehle, read in evidence there was about the time of the payment of the account sued; or maybe a little later, and that such payment was so made by Pehle at New Haven; that in the testimony of said Frentrop before said justice upon said trial, said Frentrop made no mention of two accounts for lumber for about the same amount as being paid by said Pehle, that is to say, one next before and next after the death of said Shelton, nor did said Frentrop in said testimony testify at all about any draft or check in payment of said account sued on in this case; that this affiant was not of counsel for defendant in the trial of said cause in the circuit court of said county on March 11th, but that this affiant was present in said court and heard said Frentrop testify on direct examination in said cause to the effect that said defendant paid the account sued on in said case by check to Shelton in his lifetime and that Shelton directed him, Frentrop, to give receipt for payment of account sued on, which he did accordingly and that that was about the substance of said Frentrop's testimony upon that branch of the case on direct examination; that this affiant having been counsel for defendant in said case as aforesaid until a very short time before the trial of said case in this court, knows that reasonable diligence was exercised by him and by said Pehle during all the time whilst said cause was pending in court during his employment to bring in court any and all testimony material and competent in the defense of said suit; that this affiant having heard the testimony of said Frentrop at both said trials, was surprised and has reason to believe and does believe that

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said defendant was surprised when said Frentrop testified in the circuit court at trial of this cause on March 11, 1903, to the effect that defendant paid the account sued on in this suit to him by check about the seventeenth day of April, 1900, and that he himself sold a lot of lumber to Pehle after the death of said Shelton for about $14.85 which amount said Pehle paid to him, Frentrop, in cash about the time of taking of the inventory of the estate of W. L. Shelton.''

''This affiant, O. E. Meyersieck, being of lawful age and being duly sworn on his oath states that he was employed by the defendant F. W. Pehle, in the case of M. T. Connally, administrator of the estate of W. L. Shelton, deceased, plaintiff, v. F. W. Pehle, defendant, as counsel on about the — day of March, 1903, and as such counsel thereafter represented said Pehle in the defense of said suit and knows that he exercised all proper diligence to discover and bring into court all legal testimony in the defense of said suit and that he did not know of the draft marked exhibit 'A' attached to the motion for a new trial in said cause and that he was surprised at the testimony of G. G. Frentrop given by him at the trial of said cause in this court on March 11, 1903, to the effect that defendant paid the account sued on in this suit by check before death of W. L. Shelton and that there was another account for lumber for about same amount, sold by him, Frentrop, to said Pehle after death of Shelton, from latter's lumber yard, which last named account said Pehle paid to said Frentrop in cash in New Haven about the time of the taking of the inventory of the estate of W. L. Shelton; and this affiant further says that he has reason to believe and does believe that said defendant was surprised at the trial of said cause at said testimony of said Frentrop; and that after said trial this affiant, together with the assistance of said Pehle first discovered the existence of the draft marked exhibit 'A' attached to

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motion for new trial and that this affiant verily believes that if a new trial of this case were granted the result will be different by reason of the discovery of said draft and the testimony of witnesses in respect thereof."

And also attached a check, thus:

"THE BANK OF UNION NO. 22530

"B of U Union, Mo., Apr. 14, 1900.

"Pay to the order of F. W. Pehle, Coll........$ 14.83

Fourteen and 83-100................Dollars.

Duplicate unpaid.

"TO FRANKLIN BANK,

ST. LOUIS, MO. A. W. HOFFMAN,

Cashier."

Said draft bears the following indorsements, to-wit:

"Pay to W. L. Shelton. F. W. PEHLE, Coll.

"W. L. SHELTON. G. G. FRENTROP.

"Pay Continental National Bank,

St. Louis, Mo.

Or order,

"Bank of New Haven,

"New Haven, Mo.

"G. S. BUCHANAN, Cashier.

"St. Louis Clearing House,

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"Continental National Bank."

The court in sustaining the motion for new trial assigned as the ground of its action the paragraph above copied from such motion.

REYBURN, J. (after stating the facts as above). —1. After some wavering in the decisions thereon, the rule is now well settled, that where a motion for a new trial is sustained upon a ground specified, the burden devolves on respondent in the appellate court to show



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that the motion was properly sustained upon any ground other than that designated in the order of the trial court awarding the new trial. In the language of a prior decision adopted in Emmons v. Quade, 75 S. W. l. c. 104; "If the trial court assumes to set aside a verdict for any reason not contained in the motion, it is still its duty to specify that reason upon the record; but whatever the grounds for its order, it was clearly the intention of the statute to give the right of appeal from its decision thereon, and if, in the opinion of the appellate court, its reasons are insufficient, the verdict must stand and the cost of another trial avoided, in the absence of affirmative showing by the party in whose favor the new trial was granted that it was properly set aside on other grounds," and it follows that an order for a new trial based on one ground of the motion therefor, presumes the overruling of the other grounds. Hughes v. Ittner, 133 Mo. 679; Thiele v. Railway, 140 Mo. 319; Bradley v. Reppell, 133 Mo. 545. The burden being imposed on respondent to show some other ground enumerated in his motion for a new trial upon which the circuit court should have awarded him a new trial, in absence of such showing we are confined to consideration of the action of the lower court based solely on the cause mentioned in its order setting aside the verdict.

2. Section 800, R. S. 1899, sets forth the statutory causes for which a verdict may be set aside and new trial granted, reciting among others where there has been a mistake or surprise of a party, his agent or attorney. This statute was the subject of interpretation in Fretwell v. Laffoon, 77 Mo. 26, being then section 370, R. S. 1879, but which has remained on the statute book, undisturbed without amendment to this time, and appellant and respondent have united in appealing to above case. The facts therein are stated at length, and present questions of marked

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similarity and almost identical with those involved in this record. As the true definition of the term "surprise," the eminent judge, expressing the opinion of the court, adopts the dictum of Justice STORY: "By this term is intended not merely inevitable casualty, or the act of Providence, or what is termed *vis major,* or irresistible force; but such unforeseen events, misfortunes, losses, acts, or omissions, as are not the result of any negligence or misconduct in the party." The language of that case, while characteristically forcible and vigorous, is as applicable to the facts presented by the case under consideration. "And in regard to mistake of a party as the ground for a new trial, it seems from the authorities, as well as from sound reason, that while negligence can not be claimed as surprise, neither can incredible forgetfulness, unpardonable heedlessness, or egregious blunder be classed as mistake, honest mistake which properly invokes judicial interposition."

Bearing in mind that the case had been originally heard before the magistrate in whose court it had been brought, and that the trial in the circuit court was the second trial of the cause, and occurring long after the first hearing, the setting aside of the verdict of the jury upon the ground assigned was improper and should not be upheld. Yielding full deserved credit to the affidavits, at best the defendant was convicted of carelessness and laches in not recalling the facts set forth in the affidavits in the lengthy interval elapsing between the two trials and taking advantage of them at the trial in the circuit court: any circumstances tending to evince surprise, stripped and analyzed, exhibit a state of facts establishing negligence, forgetfulness or carelessness to an extreme degree on part of defendant; all the proof referred to in the affidavits was within defendant's reach and could have been produced by the exercise of any diligence no facts tending to show which are sub-

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mitted; and a new trial should never be awarded if the surprise was owing to the least want of diligence. Tittman v. Thornton, 107 Mo. 500; 3 Graham & Waterman, New Trials, 398. The surprise charged occurred during the progress of the trial, and no application was addressed to the court for a reasonable delay to enable defendant to produce additional evidence, if desired, and after verdict of the jury such appeal is made too late. In my opinion the new trial was erroneously granted, the order awarding it should be set aside and the cause remanded with directions to enter judgment for plaintiff on the verdict. As the majority of the court, however, are of the opinion that in passing upon a motion for a new trial, the trial judge being in much better position to determine than an appellate court, much must be conceded to the discretion of the trial court in its ruling in regard to the matter, and unless it clearly appears that such discretion was unwisely exercised, which is not apparent in this case, the appellate court should not interfere, the judgment is according affirmed. *Bland, P. J.*, and *Goode, J.*, concur.

PER CURIAM.—The majority of the court desire to add to what is said in the minority opinion, that in their judgment, the newly discovered evidence almost demonstrates that the respondent has paid the account he is sued on. The account is not a large one and in his memory the payment of it became confused with another payment he had made to Frentrop, Shelton's clerk or manager. When he heard Frentrop testify concerning the two payments and that the account in suit had been paid to Shelton personally in his lifetime, the respondent was at first surprised, but gradually the facts came to him; especially when it was found the draft on the bank verified Frentrop's statement. It is said the respondent was remiss in not recalling the truth sooner; but a man can not always control the operation

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of his memory. Persons often receive an inkling about some forgotten matter that at first seems strange to them, but sets to work a train of associations which ultimately bring into recollection all the details. So it was with Pehle. We think he was not negligent; at least does not so certainly appear to have been that we ought to disturb the order for a new trial, which manifestly makes for justice.

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## PHILLIPS, Respondent, v. BARNES, Appellant.

**St. Louis Court of Appeals, March 1, 1904.**

1. **PLEADINGS: Departure: Waiver.** Objection to an amended petition on the ground that it states a new cause of action is waived by pleading to it and going to trial.

2. ———: ———: **Motion to Strike Out.** The proper way to make objection to it is by motion to strike out, not by objection to evidence in support of it.

3. ———: ———: **New Cause of Action in Replication: Waiver.** The petition stated a cause of action for the price of timber sold upon an oral contract; the answer denied the contract sued on, setting up a subsequent written contract of sale and alleging payment of the contract price; the replication admitted all the averments of the answer except that of payment, which averment was denied; the defendant made no objection in the trial court, that the reply departed from the petition, and there was a verdict for plaintiff. *Held*, defendant could not be heard to assign for error that the plaintiff's judgment is not supported by his petition.

4. ———: **Contract: Ambiguity: Jury Question.** The written contract set up in the answer recited that plaintiff had "given this my lease to said lands for the term of seven years" and then proceeded as follows: "I have received in full consideration for the above lease the sum of $325," and the replication admitted every fact set up in the answer except that the timber had been paid for which it expressly denied. *Held*, the replication did not admit payment, and, under the most favorable construction of the instrument for the defendant, its

**terms were so ambiguous that the question whether the $325 was received as payment for the lease alone, or for the timber as well as the lease, was properly submitted to the jury.**

Appeal from New Madrid Circuit Court.—*Hon. H. C. Riley,* Judge.

AFFIRMED.

*E. F. Sharp, Lawrence Fisher* and *Robert Rutledge* for appellant.

(1) Plaintiff to the answer filed his replication, as follows: "Plaintiff for replication admits each and every fact set out in the answer except that the timber has been paid for, which he specially denies." By this replication he admits that the contract was not an oral one as alleged in his petition, and that the contract dated January 13, 1899, was entered into, and thereby plaintiff sold and conveyed to defendant said timber for $325; that plaintiff executed that instrument as set up in defendant's answer, and the recitation therein, that he had received in full consideration the sum of $325, although he denies that the timber has been paid for. Murphy v. St. Louis, 8 Mo. App. 483. (2) On the offering of the written contract of January 13, 1899, by plaintiff and plaintiff's testimony that it set aside all existing contracts, and that he had received the $325 for the timber on said lands, this demurrer should have been sustained. Trimble v. Stewart, 35 Mo. App. 537; Walker v. Martin, 8 Mo. App. 561. (3) Plaintiff says in his petition that he "verbally" contracted the timber growing and standing on said lands to defendant. Growing timber unsevered from the land can only be conveyed by instrument under seal. Andrews v. Costican, 30 Mo. App. 29; Potter v. Everett, 40 Mo. App. 153. (4) At no time did the burden of proof rest upon defendant. Bunker v. Hibler, 49 Mo. App. 536; Lumber Co. v. Miller, 64 Mo. App. 620.

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*Jas. V. Conran* for respondent.

Appellant having elected to file his answer to the third amended petition, and after his demurrer thereto had been by the court overruled, can not now be heard to complain of the defects and departure in said petition contained. Ins. Co. v. Tribble, 86 Mo. App. 546; Bank v. Pettit, 85 Mo. App. 499; Sawyer v. Wabash, 156 Mo. 468; Rogers v. Ins. Co., 93 Mo. App. 24; State ex rel. v. Bank, 160 Mo. 640; Mankameyer v. Egelhoff, 93 Mo. App. 183; Estes v. Desnoyers Shoe Co., 155 Mo. 577; Bernard v. Mott, 89 Mo. App. 403; Lathrop v. Mayer, 86 Mo. App. 355.

GOODE, J.—Plaintiff sued for the price of timber on 320 acres of land in New Madrid county. His petition stated that on February 5, 1898, he and the defendant entered into a verbal contract for the sale by him and the purchase by the defendant of the timber on certain tracts containing a stated number of acres, the purchase price being $1,000; that the defendant cut and removed the timber and converted it to his own use, but refused to pay for it; that the plaintiff had complied with his contract of sale and the defendant ought, in equity and good conscience, to pay the agreed price. The petition was crudely drawn, departed from the cause of action stated in two petitions previously filed and substituted a new cause of action; but the judgment should not be reversed on that account, as the objection was waived by the defendant pleading to the last petition and going to trial. Liese v. Meyer, 143 Mo. 547; Bernard, Admr., v. Mott, 89 Mo. App. 403. It is true an objection was made to the reception of any evidence on the score that the last petition stated a new cause of action; but the proper way to preserve the objection was to stand on a motion to strike out the petition. Previous citations; Scoville v. Glasner, 79 Mo. 449. The objec-

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tion to the evidence was rightly overruled; for that an amended petition states a new cause of action is no basis for such an objection, which raises the question of whether a case is stated at all.

The answer denied that the contract for the sale of the timber was verbal and set up a written instrument dated February 7, 1898, and signed by the plaintiff, as constituting an earlier contract for the sale of the timber than the one finally executed. Said instrument described more than 1,000 acres of land and recited that plaintiff agreed to sell the timber right on it to several persons, among them the defendant, for a first mortgage bond of $1,000, to be issued by a railroad company that intended to build a railroad in New Madrid county. The instrument gave the vendee seven years after the expected railroad was open for business, to remove the timber. The answer further stated that an examination of the plaintiff's title to said 1,000 acres of land disclosed that he owned only a part of it and in consequence said earlier contract was rescinded by mutual consent, and afterwards, on January 13, 1899, another instrument was executed by the plaintiff, selling the timber on all the land which he owned to the defendant; the last contract being in abrogation of the one of February 7, 1898. The document of January 13, 1899, was copied in the answer and is of the following tenor:

"New Madrid, Missouri, January 13, 1899.

"To whom it may concern: This is to certify that I have this day sold to S. S. Barnes, his administrators, heirs or assigns, all the timber that is on the lands herein described and give this my lease to said lands for the term of seven years from this date; that is to say:

"The southeast quarter of section 10, 160 acres, and the south half of southeast quarter, and southeast quarter of southwest quarter, section 11, 120 acres, and the southeast quarter of northeast quarter of section 22, 40 acres, in all three hundred and twenty acres, in town-

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ship 22, range 13, in the county of New Madrid, State of Missouri.

"I have received in full consideration of the above lease the sum of three hundred and twenty-five dollars.

"(Signed) A. R. PHILLIPS."

The answer stated that the plaintiff had been fully paid by the defendant for the timber purchased by him.

A replication was filed which admitted every averment of the answer, except that the defendant had paid for the timber, which averment was denied.

It is said that, besides the departure of the last petition from the cause of action stated in the previous ones, the replication departed from the case stated in the last petition, and the plaintiff recovered on a contract different from the one declared on in it; that he declared on a verbal contract made in 1898; admitted in his reply that said contract had been abrogated by the written one of January 13, 1899, and obtained judgment on a finding that the timber was sold but had not been paid for. This is argued to be the result of the admission in the replication of everything averred in the answer except payment, as the answer averred the abrogation of the agreement of February, 1898, by the one of January, 1899. No doubt there was a diversion of the issues as tendered by the petition; but who did it? The defendant himself in his answer. While a general denial would have been sufficient to put in issue the contract declared on by the plaintiff, defendant went further and tendered new issues. As the replication traversed the averment of payment and admitted all the other averments of the answer, no issue was joined but the one of payment. Now the defendant, besides unnecessarily tendering new issues, never raised the objection that the allegations of the last petition were abandoned by the reply, and that in the reply the plaintiff sought judgment on a different case from the one set up in the petition. Both parties went to trial uncomplainingly on

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the issue of payment made by the answer and the replication, thereby acquiescing in the change of the issues. It should be stated that though the defendant's counsel objected to evidence because the last petition departed from the previous ones, they did not object, at any time, on the ground that the reply departed from the last petition; nor did they demur to the reply, move to strike it out, or take any action against it. With the record in this state the defendant will not be heard to assign for error, that the plaintiff's judgment finds no support in his petition. The very point was discussed and decided by the Supreme Court in Jones v. Rush, 156 Mo. 364; and by the Kansas City Court of Appeals in Lathrop v. Mayer, 86 Mo. App. 355. In each of those cases the answer pleaded a defense which was not in the nature of a confession and avoidance of the plaintiff's case, but rested on a contract entirely distinct from the case stated in the petition. The plaintiff's reply accepted the issues thus tendered and the trial was had as to the facts put in issue by the answer and the reply. On appeal, the defendants sought to take advantage of the supposed departure; but their exceptions were overruled, on the ground that the point had been waived. What would be the effect of a tender of new and wholly distinct issues by the defendant, accepted by a replication, if a point was made about the matter at the trial, we need not inquire.

The argument is pressed on our attention that the replication confessed plaintiff had been paid for his timber; but instead of making such an admission, the replication denied payment had been received. That pleading runs in this wise: "Plaintiff, for replication, admits each and every fact set up in the answer, except that the timber has been paid for, which he expressly denies." The defendant's counsel contends the effect of the replication is to admit the timber was sold by the contract of January 13, 1899; and this is true.

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They contend another effect of the replication is to admit plaintiff had received $325, the full consideration stated in the last mentioned contract, and that he received said sum for the timber. This reasoning is unsound, as will appear by reference to the instrument, which not only recites that Phillips had, on January 13, 1899, sold the timber on certain tracts of land to Barnes, but that the former had given the latter a lease on said lands for a term of seven years. It then proceeded as follows: "I have received in full consideration of the above lease the sum of $325." When a consideration is not stated as an integral part of a contract, there may be an inquiry on outside testimony, as to what the true consideration was. Williams v. Railway, 85 Mo. App. 103. If the consideration in question is so expressed that we must be bound by the words of the instrument, their effect is that the $325 were to be paid by Barnes for the lease, instead of for the lease and the timber as Barnes maintains; for it is plain the document states the sum as a consideration for the lease; not mentioning the timber in the same connection. This would leave the consideration for the timber dependent on evidence *aliunde;* and Phillips swore the price of it was to be $1,000, and that the $325 were to be paid as rental for the seven-year lease of the lands. Barnes testified the latter sum covered both the price of the timber and the rent. The most favorable construction of the instrument for the defendant is that its terms are so ambiguous that oral evidence was competent to prove the consideration mentioned in the instrument was intended to cover both the timber and the rent, as Barnes swore. That interpretation is doubtful; but if we grant it, as we may for the purposes of this appeal, Barnes can not be helped; because the jury rejected his version in favor of the plaintiff's. The trial court let in testimony offered by the parties on the question of what the sum of $325 was received as payment for, and whether

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it was meant to pay for the timber as well as the lease, submitted the matter to the jury by instructions, and as it was disposed of by the jury as an issue of fact, their finding is conclusive.

The defendant admitted getting the timber, but pleaded payment for it, and he had the burden of proof on the issue. Griffith v. Creighton, 61 Mo. App. 1.

There is no other point in the briefs that requires attention; so the judgment is affirmed. *Bland, P. J.*, and *Reyburn, J.*, concur.

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STATE OF MISSOURI, Respondent, v. TERRY, Appellant.

St. Louis Court of Appeals, March 1, 1904.

**DRAMSHOPS: Instructions to Bartenders.** Where, on the trial of defendant, a licensed dramshop keeper, on the charge of selling liquor on Sunday, the testimony of the defendant himself, and other witnesses for him, was to the effect that he had given his barkeepers rigid instructions not to sell on Sunday, and the evidence for the State, elicited from reluctant and hostile witnesses, showed the commission of the acts complained of by defendant's barkeepers, and the jury were instructed to consider whether defendant's instructions to his barkeepers, not to sell on Sunday, were made in good faith, a verdict of guilty will not be disturbed.

Appeal from Dunklin Circuit Court.—*Hon. J. L. Fort*, Judge.

AFFIRMED.

*C. M. Edwards* and *J. L. Downing* for appellant.

REYBURN, J.—The grand jury of Dunklin county, Missouri, being empanelled for a special term, August, 1902, returned five indictments against defend-

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ant, a licensed dramshop keeper, for unlawfully selling liquors on the first day of the week, commonly designated as Sunday. The record recites that a capias issued upon the several indictments and was returned served by arresting the defendant, and putting him under bond for his appearance at the November term of court. By order of the circuit court four of the indictments were consolidated with the fifth, and they were tried as the latter consolidated, the defendant first pleading not guilty, the trial proceeded by consent before a jury composed of six members, and a verdict of guilty was found with fine of $50 as the punishment imposed for the use of the county school fund of Dunklin county.

At close of the State's case comprising the testimony of several witnesses, the demurrer of defendant to the evidence of the prosecution as insufficient to sustain the allegations of the indictment was overruled, and the testimony on behalf of defendant proceeded. The evidence of defendant himself and of the witnesses introduced in his defense was directed to prove his innocence of the charges and particularly to establish that he had given to his barkeepers rigid instructions not to be guilty of breaches of the law by dispensing liquor on Sunday, and therefore that conceding they had so violated the law as the testimony of the State tended to show, he was exonerated from liability and not to be held responsible for such guilty acts of his servants.

The jury returned a verdict of guilty upon one count, imposing a penalty of fine of fifty dollars. The proof introduced by the State, through the numerous witnesses examined, tended to show the commission of the acts alleged by the barkeepers and the presumptive guilt of the defendant of the charges preferred in the indictments and the demurrer interposed by defendant was properly overruled.

The State, as not infrequently happens in such

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cases, encountered conspicuous difficulties in prosecuting the charges and was compelled to rely for their substantiation upon statements elicited from reluctant and hostile witnesses. While the examination of the latter plainly disclosed their disposition to screen and aid defendant in escaping conviction, their testimony, though evasive and dissimulating, left little room for doubt of the guilt of defendant. The defense sought to be upheld was embodied in instructions presenting, as favorably as was warranted, for the consideration of the jury the question whether in good faith defendant had prohibited his servants from dispensing liquor on Sunday and the finding is conclusive thereon. The result of the trial was fully sustained by the testimony and the judgment is affirmed. *Bland, P. J.*, and *Goode, J.*, concur.

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## KRONCK, Appellant, v. REID, Respondent.

**St. Louis Court of Appeals, March 1, 1904.**

1. **APPELLATE PRACTICE: Brief of Appellant.** Where the appellant's "statement, points and argument" contains no statement of the pleadings or facts shown by the record, no enumeration of the legal propositions relied upon, nor any assignment of errors alleged to have been committed by the trial court, the appellate court would be warranted in affirming the judgment.

2. ———: **Affirming for Failure.** Where an appeal has not been perfected in time for the term of the appellate court to which it is returnable, the cause will nevertheless not be affirmed for such failure, unless the respondent properly takes advantage of such failure by fulfilling on his part the conditions of section 812, Revised Statutes of 1899.

3. **VERDICT: Proper Judgment on Informal Verdict.** A verdict which is improper in form is sufficient to sustain the judgment rendered thereon in accordance with the testimony.

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Appeal from St. Charles Circuit Court.—*Hon. E. M. Hughes,* Judge.

AFFIRMED.

*John J. Stahlschmidt* for appellant.

*C. W. Wilson* and *F. A. Heidorn* for respondent.

(1) Appellant's so-called "statement, points and argument" filed in this cause is no compliance with these rules, and the cause should be dismissed for this reason. Rule 19 of rules of practice; McCullom v. Ulen, 87 Mo. App. 606; R. S. 1899, sec. 863. (2) If the appeal is not dismissed for the reason assigned above, the judgment should be affirmed because the appellant failed to comply with the requirements of sections 812 and 813, Revised Statutes of 1899. The bill of exceptions was filed in this cause September 9, 1901. It was the duty of appellant to have perfected his appeal by filing the transcript in this court fifteen days before the first day of the March term, 1902, of this court. He did not file his transcript until — ——, 1902. The cause should be dismissed for this cause. R. S. 1899, secs. 812, 813; Johnson v. Riggs, 67 Mo. App. 491; Laundry Co. v. Ins. Co., 62 Mo. App. 11; Dore v. Smith, 59 Mo. App. 58; Sosman & Landis v. Conlon, 59 Mo. App. 313. (3) The judgment is right in form and in favor of the right party, and should be affirmed. Clarkson v. Jenkins, 48 Mo. App. 221; Herring v. Corder, 49 Mo. App. 378; R. S. 1899, sec. 4475; Dillard v. McClure, 64 Mo. App. 488.

REYBURN, J.—The record in this case is made up of about one hundred and fifty typewritten pages, and the appellant exhibits in his brief what he terms his "statement, points and argument," occupying two full and two fractional pages of printed matter. This tract

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fails to comply with the rules of practice prevailing in this court, and section 863 of the present statutes, in every particular and requirement: it does not contain any statement of the pleadings or facts shown by the record, no enumeration of the points or legal propositions made or relied upon, nor is any assignment of the errors alleged to have been committed by the trial court therein contained. Neither is any testimony, in full or abstracted, on the part of plaintiff, or defendant, set out, nor any exceptions saved against the rulings of the trial court exhibited. No authorities and no argument deserving such description are submitted, but in lieu there is but a confused commingling of a limited number of references to the bulky record and assertions of conclusions on behalf of the appellant. It is needless to add that under such condition of this record this court would have been fairly warranted in affirming the judgment below without going further. We, however, refer to the condition, in which the case is presented to this court, as an earnest protest against the unnecessary labor so frequently imposed on this court by failure to comply with the clear language of the statute, as well as of the rules adopted and controlling the practice in this court.

2. This appears to be an action, in which the plaintiff by a writ of replevin sought to recover possession of a pair of horses. The proceeding was inaugurated before a justice of the peace of St. Louis county, which, after a change of venue, was tried before a jury, which returned a verdict for the defendant, and plaintiff appealed therefrom to the circuit court of St. Louis county, and subsequently took a change of venue to the circuit court of St. Charles county, where the case was retried and a jury, on March 23, 1901, again returned a verdict for the defendant which was in the form following:

"We, the jury, find for the defendant Reid, and we further find the value of the horses taken by plaintiff

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out of defendant's possession at the time they were taken to be the sum of $200, and we further find that plaintiff is indebted to the defendant at the time under the contract of August 24, 1899, in the sum of $189.10 (one hundred and eighty-nine 10-100 dollars) together with the amount expended on repairs of vehicle, which is a lien on the horses."

At the same term, being the March term of said circuit court, after plaintiff's motion for new trial had been overruled, an appeal was granted him on April 30, 1901, to this court, wherein the record was filed March 3, 1902, although the appeal under the statute was properly returnable to the next, being the October term, 1901 of this court; respondent, however, has failed to properly take advantage of this non-compliance by appellant in not fulfilling on his part the conditions of the statute (R. S. 1899, sec. 812), and his application to affirm the judgment is denied.

The defendant incorporated in his answer the following contract:

"St. Louis, Mo., Aug. 24, 1899.

"Know all men by these presents that H. S. Kronck has this day borrowed of Oscar Reid the sum of one hundred dollars, and delivered to said Oscar Reid as security for the payment thereof the following described property, to-wit: One bay two-year-old gelding named Rappahanock, registered number 32251, and one two-year-old bay filly named Elsie Marie, registered, certificate number 36730, the said Oscar Reid to have and to hold the same until said one hundred dollars and interest at six per cent is fully paid. It is understood and agreed that said Oscar Reid shall have the right to purchase either or both of said colts within thirty days from date hereof for the sum of one hundred dollars apiece. Should said Reid so purchase no expense for keeping the colt or colts purchased to be deducted from



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said one hundred dollars apiece. In case said Reid does not elect to purchase as aforesaid, the said Kronck agrees to pay said Oscar Reid for keeping said colts $2.50 apiece, and the actual costs of oats by them consumed and nothing further. The said H. S. Kronck represents and the said one hundred dollars is advanced by said Reid upon the representation that the said Kronck is the absolute owner of said colts and that they are free and clear from any and all incumbrances, or liens, said one hundred dollars to be paid to said Oscar Reid, in case said Reid purchased neither colt six months from the date hereof should said one hundred dollars not be paid within one year from the date hereof as aforesaid this agreement to constitute and be an absolute bill of sale of the said colts to said Oscar Reid, and the said Kronck shall then have or claim no further interest therein. Should said Reid elect to purchase within 30 days the remaining $100 to be paid cash, $30, $35, in 30 and $35 in 60 days therefrom, the said Kronck to drive both colts.

"O. Reid.
"H. S. Kronck."

The testimony tended to show that the money mentioned in this contract, together with costs enumerated, attending, feeding and caring for the animals, have never been paid; but the plaintiff asserted that defendant was indebted to him for services rendered whereby this indebtedness has been liquidated and cancelled.

At the close of all the testimony the court charged the jury in all instructions submitted and asked by plaintiff, and in five instructions asked by defendant. These submitted the issues fairly and fully to the consideration of the jury and no complaint was made by the appellant respecting them, nor does he indicate any reversible error committed at the trial. The form of the verdict, which is censured by appellant, is sufficient to sustain the judgment rendered thereon by the court,

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which was for the return of the horses to the possession of defendant to be held by him as security, for the sum of $189.10, or at defendant's election that he recover of plaintiff and his sureties said sum. The judgment is accordingly affirmed. *Bland, P. J.*, and *Goode, J.*, concur.

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## SEE, Appellant, v. RUNZI, et al., Respondents.

**St. Louis Court of Appeals, March 1, 1904.**

1. **GAMBLING: Option Dealing.** Losing money in option deals, where money is deposited or paid for margins, is not losing money at a game or gambling device, so as to authorize a recovery of the amount lost, under section 3424, Revised Statutes of 1899; the statutes, (sections 2221 to 2225 and 2337 to 2342), which declare such dealing to be gambling, affix a different punishment.

2. ———: **Stakes Lost.** The loser of a bet, in the absence of statutory enactment authorizing it, can not recover a stake which he has voluntarily paid the winner.

Appeal from Montgomery Circuit Court.—*Hon. E. M. Hughes*, Judge.

AFFIRMED.

*Claude R. Ball* for appellant.

(1) The plaintiff's petition states a cause of action against defendants, and the demurrer should have been overruled. Revised Statutes 1899, secs. 2337, 2338, 2339, 2341 and 2342; Revised Statutes 1899, secs. 2221, 2222, 2223, 2224 and 2225. (2) Under section 2337, R. S. 1899, option dealing or dealing in futures is declared to be gambling. (3) Section 2224, R. S. 1899,

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declares that all purchases and sales, contracts and agreements for the purchase and sale of any of the property mentioned in and in violation of sections 2222 and 2223 are gambling and criminal acts, etc. (4) Plaintiff's petition plainly charges that defendants were engaged in running, conducting and operating a certain game or gambling device, commonly called a bucket-shop or dealers in options or futures, by means of which he lost his money, which by law is declared to be gambling. Connor v. Black, 119 Mo. 139; s. c., 132 Mo. 154. (5) When a statute plainly declares certain things and acts to be gambling, then in reason if such things and acts are gambling, they must under our statute be construed to mean a "game or gambling device." Hence, this action comes within the meaning of section 3424, and the money lost by plaintiff and won by defendants can be recovered under said section. Cato v. Huston, 7 Mo. 143; 14 Am. and Eng. Ency. of Law (2 Ed.), p. 640, note 1. Same authority, p. 624, note 1. (6) Dealing in options or futures is held by this court and our Supreme Court to be a wager. Williams v. Wall, 60 Mo. 318; Waterman v. Buckland, 1 Mo. App. 45; Kent v. Miltenberger, 13 Mo. App. 508; McLean v. Stuve, 15 Mo. App. 319; Buckingham v. Fitch, 18 Mo. App. 99; Johnson v. Kanne, 21 Mo. App. 25; Wright v. Fonda, 44 Mo. App. 645; Hill v. Johnson, 38 Mo. App. 383; Doxey v. Spaides, 8 Ill. App. 549; Commercial Bank v. Spaides, 8 Ill. App. 493.

REYBURN, J.—The amended petition of plaintiff in this action was adjudged defective upon demurrer thereto. The complaint charged that defendants were conducting a game or gambling device, commonly called a bucket shop, or were dealers in options or futures in Montgomery county, as well as the city of St. Louis whereby means of such game or gambling

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device, defendants made such purchases and sales, and pretended contracts for purchase and sale of shares of stocks and bonds of corporations and of provisions, cotton, grain and agricultural products, or feigned to buy and sell on margins, without any intention of receiving or delivering the property so bought or sold by them. Continuing, the petition recited that plaintiff, during the months of February and March, 1903, by means of such game or gambling device, dealt in options and futures with defendants, and bought from defendants on margins a large number of shares of stock of various corporations and several thousand bushels of grain; that at no time did he intend to receive any stock or grain bought or sold by him and none was received from defendants. That all transactions he made with the defendants, for stocks of various corporations and for wheat, oats and corn, were upon such game or gambling device, and upon margins without any intention to receive or deliver any of the property so bought or sold by either plaintiff or defendants. Concluding, the petition contained assertions that, within three months prior to the action, defendants had won from plaintiff by means of such game or gambling device, a sum named, being the difference between the amount paid by him to them and received by him from them, for which judgment was asked.

The demurrer assigned that the facts contained in plaintiff's petition did not constitute a cause of action, as dealing or gambling in options where money was deposited or paid for margins and lost, did not evidence a game under the statutes to permit recovery of the money lost, and the petition did not state facts showing a mere deposit for wagering purposes, where the depositor sues for the deposit before the wager is executed, but merely payments by way of margin which were actually lost or consumed in the fluctuations of the

market. Under the common law of England, gambling contracts, excepting special classes of wagering contracts, were valid and actionable at law. 14 American & English Encyclopedia of Law (2 Ed.), p. 587, and authorities cited. Such appears to have been the early law in this State (Waddle v. Loper, 1 Mo. p. 458 or 636); but in Missouri, as in England, gambling was soon recognized as an evil and vice, and statutes adopted to repress it, and the law now prohibits all gambling contracts, whether undisguised, or masked under the form of legitimate business. The State criminal code interdicts the class of unlawful transactions described in the petition herein, and imposes penalties of fine and imprisonment, varying in degree and severity; especially declaring such fictitious sales and purchases, gambling and criminal acts, and rendering all parties thereto *particeps criminis*. R. S. 1899, secs. 2221 to 2225, inclusive; sec. 2337 to 2342, inclusive. Sestion 3424 of the statutes, provides that any person who shall lose any money or property at any game or gambling device, may recover it by civil action. The application of this section to the class of transactions set forth in the petition was attempted and denied in the case of Connor v. Black, 132 Mo. 150. The provisions therein considered and construed, then designated as number 5209 of the revision of 1889, remain without amendment, undisturbed in the revision of 1899, as above cited, and the same remark is equally true of the criminal sections above enumerated. In the course of this decision, the court observed: "Until the enactment of these sections, which specially denounce these option dealings as gambling, they were not within the statute. When they were so declared, the legislature at the same time affixed a punishment, but it did not provide for a recovery of the money voluntarily invested in said ventures. Accordingly, we think that not only the ordinary signification of the words themselves, but the

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legislation on the subject, alike forbids an interpretation which ascribes to the words 'game' or 'gambling devices' the meaning attributed to them by the defendant.'' In general, the rule of law is that the loser voluntarily paying to the winner the stake lost, can not recover it, in absence of express special statutory enactments, conferring such right of action. Am. & Eng. Ency. Law, supra, p. 623, and authorities cited.

The judgment is affirmed. *Bland, P. J.*, and *Goode, J.*, concur.

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## TORREYSON, Respondent, v. TURNBAUGH, Defendant; LUSTER, Interpleader, Appellant.

St. Louis Court of Appeals, March 1, 1904.

1. **INTERPLEA: Parties.** An interplea is an independent action engrafted on the original attachment and it is in the nature of an action of replevin for possession of the goods attached, in which the interpleader occupies the position of plaintiff and he must establish that he was owner of the goods at the time of the attachment, or had such an interest as would entitle him to possession.

2. **———: Evidence.** Statements of a defendant in an attachment suit are not admissible in evidence as against the interpleader.

3. **FRAUDULENT CONVEYANCE.** One who has received payment of an indebtedness due him, from the purchase money paid his debtor as a consideration for the sale of the latter's goods, with a knowledge of the source from which the money came, can not afterwards attack such sale as in fraud of creditors.

Appeal from Audrain Circuit Court.—*Hon. E. M. Hughes*, Judge.

REVERSED AND REMANDED.

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*E. C. Kennan* and *Geo. Robertson* for appellant.

*P. H. Cullen* and *W. H. Logan* for respondent.

(1) The dissolution of an attachment caused by the dismissal of the suit gives to the defendant (not to some outside party) the right to the possession of the attached property. Camp v. Schuster, 51 Mo. App. 406; Smead v. Wegman, 27 Mo. 196; Young v. Kellar, 94 Mo. 599. (2) The instruction refused and of which complaint is made embodies the theory of estoppel and as no estoppel was pleaded there was no such issue in the case. There is nothing better settled in the law of this State than the fact, that a party seeking to take advantage of an estoppel, must plead it. Plow Co. v. Wayland, 81 Mo. App. 305; Sanders v. Chartrond, 158 Mo. 361; Chance v. Jennings, 159 Mo. 558; Casler v. Gray, 159 Mo. 544; Codemolino v. Ganger, 160 Mo. 352; Cockrell v. Autchison, 135 Mo. 75; Throckmorton v. Pence, 121 Mo. 60; Bray v. Marshall, 75 Mo. 327; Avery v. Railroad, 113 Mo. 561; Noble v. Blount, 77 Mo. 235; Messersmith v. Messersmith, 22 Mo. 372; Hammerslaugh v. Cheatham,, 84 Mo. 21. (3) If the interpleader desired to show that plaintiff was estopped from claiming a fraudulent sale that was new matter and should have been pleaded. Glenn v. Priest, 48 Fed. 19; Northcup v. Ins. Co., 47 Mo. 443; Musser v. Adler, 86 Mo. 445.

STATEMENT.

Respondent brought this attachment suit to the January term, 1903, of circuit court of Audrain county; the petition was subdivided into two counts, the first based upon an agreement by which, it was alleged, defendant was to convey to plaintiff realty described in Monroe county, subject to an incumbrance not exceed-

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ing $1,200, paying up acrued interest and taxes and permitting plaintiff to have the rental accruing for year terminating March 1, 1903; defendant to receive in exchange a stock of groceries and store fixtures in the city of Laddonia. Plaintiff averred performance of his part of the contract, but charged default by the defendant in failing to pay accrued interest and taxes, and not letting plaintiff have rental, which defendant himself collected, and judgment for $215 was prayed. The second count was for balance claimed for merchandise sold and delivered to defendant, amounting to $16.32: the attachment was levied upon the stock of goods referred to in first count. The appellant on the third of January, 1903, filed an interplea under the statute (R. S. 1899, sec. 417), duly verified by his affidavit, affirming in general terms, that at time of attachment he was the owner of the property, money, effects and credits attached by the sheriff in the cause; and reiterating that he was the owner of all the goods, wares, merchandise, fixtures, furniture and all and every article of personal property attached, prayed judgment for their possession.

The facts divulged at the trial briefly were, that plaintiff, a merchant at Laddonia, in June, 1902, transferred his stock of merchandise to defendant, the latter giving in exchange therefor the land described in plaintiff's first count, and $375 in money, procured from the Farmers Bank of Laddonia by discount of a note upon which plaintiff was surety and subsequently paid. On October 30 of the same year, defendant sold the remaining goods to interpleader, his father-in-law, a resident of California, Missouri, who took possession the day succeeding: payment therefor was made in part by the return and surrender of a note for $250, for money borrowed, executed to appellant by defendant and his brother, and in part to extent of $460 in cash, which appellant or defendant obtained from the Morgan

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County Bank at Versailles, upon a note of appellant, secured by mortgage on property in Clarksburg, Missouri, owned by appellant's wife. The proceeds of this last loan were applied to discharge the indebtedness of defendant to plaintiff, evidenced by the note for $375, on which plaintiff was surety and had paid; $10, an overdraft at bank, and in payment of costs accrued in first attachment suit brought by plaintiff against defendant; and a balance of $90 of the purchase price remained unpaid defendant by appellant. After maturity of the note for $375, the interpleader, on November 1, 1902, guaranteed its payment in consideration of forbearance or extension of its payment for five days, and defendant proceeded to Morgan county to obtain the money on a note secured as stated by property of appellant's wife; during his absence the earlier attachment was brought in the circuit court of Audrain county by plaintiff against defendant, in three counts; the first count being identical with first count of the present action, and the second and third counts both based on the note for $375 (and both seeking its recovery), so frequently alluded to. Upon return of defendant from Versailles, with money obtained as stated, he settled the pending suit by payment of the $375 and interest, together with court costs, $408 in all, and this action was dismissed under the following stipulation:

"It is hereby agreed between all parties hereto, that the above entitled case shall be withdrawn by the plaintiff upon the following stipulation and terms, that in consideration of the payment to said C. A. Torreyson of three hundred and eighty-five dollars, and all of the costs in said case, that said C. A. Torreyson will withdraw said suit and acknowledge full satisfaction of the court in said petition, referring to a note for $375, dated June 18, 1902, due in 30 days, payable to the Farmers Bank of Laddonia and assigned by it to C. A.

Torreyson, but the said C. A. Torreyson does not acknowledge satisfaction of the other count in said petition, but withdraws the whole case. And this case being an attachment case, W. R. Luster, claimant of the goods attached does hereby in consideration of the releasement of certain attached goods, does hereby waive all rights he has and releases said plaintiff and his bondsmen from any and all liability on the attachment bond and further releases Quincy James, sheriff of Audrain county, Mo., from any and all liability on his official bond as sheriff of said county in his official acts in the premises.

"(Signed) C. A. TORREYSON,
"Plaintiff.
"ALEX. TURNBAUGH,
"Defendant.
"W. R. LUSTER,
"Claimant Goods."

Within a brief period after its dismissal, plaintiff brought this action again attaching the same property.

Under the instructions given, the jury found in favor of plaintiff, and after unsuccessful motion for new trial, the interpleader has appealed.

REYBURN, J. (after stating the facts as above).—1. As has been frequently stated in the numerous cases found in the appellate courts of this State an interplea is another and independent action engrafted on the original proceedings, in which the interpleader assumes the attitude of plaintiff and the attaching creditor that of defendant; being substantially and in effect an action of replevin for the recovery of the specific property levied on under the attachment writ, and in which it devolves upon the interpleader to establish, that he was owner of such property at the time it was attached, or that he had a special interest therein and was entitled to its possession. Brownell v. Barnard, 139 Mo.

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142; Graham v. Crowther, 92 Mo. App. 273; Ely v. Mansur, 87 Mo. App. 105; Stadden v. Lusk, 95 Mo. App. 261; Dry Goods Co. v. Carr, 83 Mo. App. 318; Hardware Co. v. Hardware Co., 75 Mo. App. 518; Carp v. Itskowitz, 77 Mo. App. 592.

The respondent over objection of appellant was permitted to repeat in evidence, statements asserted to have been made to him by defendant, Turnbaugh, respecting his own financial condition; these statements were mere hearsay, the party, whose admissions or utterances they purported to be, was no party to the issue on trial, they were not offered as foundation for impeachment, nor were they pertinent to any issue on trial, and they could not but be highly prejudicial to the interpleader's rights and should have been excluded.

2. The interpleader asked the following instruction, which the court refused:

"The court instructs the jury that, although the sale claimed between Turnbaugh and Luster was first made in fraud of Turnbaugh's creditors, yet if you further find that said Torreyson brought an attachment suit claiming that said sale was fraudulent and dismissed the same upon the payment of the $375 note and released the stock of goods attached and at the time of said dismissal said Luster claimed said stock of goods as his and became a party to such dismissal and settlement, and said Torreyson dismissed said suit, knowing that said Luster claimed the stock and consented to such claim and accepted the said money paid by Turnbaugh, knowing it was from the purchase price of said stock of goods and paid to said Turnbaugh by said Luster for the said purchase, then said Torreyson consented to said sale and can not complain of the same nor claim that it was fraudulent and void as against creditors, and you will return a verdict for the interpleader."

There was testimony, from which it might be fairly inferred, that respondent was aware of the source from

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which defendant obtained the funds, by which he made payment to him, upon receipt of which the first attachment suit was dismissed; and tending to show that such money was part of the purchase price paid defendant by appellant for the stock of goods. If the sale by defendant to appellant was originally in fraud of the creditors of the former, such fraudulent transfer was but voidable, and capable of being rendered valid by its subsequent recognition or approval by plaintiff; if he accepted the payment of $385 made in discharge of the note, principal and interest, from the money paid defendant by appellant for the goods with knowledge on his part of the source and consideration of defendant's obtaining it, such action on plaintiff's part would constitute a ratification of and assent to the sale, and preclude him from thereafter impeaching as fraudulent the transaction between defendant and appellant. It is manifest that it would be gross injustice to permit plaintiff to realize payment of an indebtedness due him from defendant from the purchase money and consideration of the sale of the goods by defendant to interpleader, and later allow him to impugn as a fraud upon him, the contract between the vendor and vendee, by which he had profited by his acceptance of a part of the proceeds, and to which, in a measure, he had thus made himself a party. "A fraudulent transfer is merely voidable and consequently is capable of confirmation, either by assent at the time, or by a subsequent ratification, for no one can predicate fraud of facts which have his assent upon a full knowledge of them." Bump, Fraudulent Conveyances (4 Ed.), sec. 455.

The doctrine that a creditor who knowingly acquiesces in a sale and accepts benefits arising from it can not afterwards attack it on the ground that it was made in fraud of creditors, is elaborately considered by the Supreme Court in the case of Thompson v. Cohen, 127 Mo. 215; after a lengthy review of the authorities

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gathered from England, as well as in the United States, the above principal was therein applied and the creditor held estopped by his own action, and that case is decisive here.

The instruction above quoted should have been given.

The judgment is accordingly reversed and the cause remanded. *Bland, P. J.*, and *Goode, J.*, concur.

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JORDAN, Admx., Defendant in Error, v. CHICAGO & ALTON RAILWAY COMPANY, Plaintiff in Error.

St. Louis Court of Appeals, March 1, 1904.

1. **AMENDMENTS: Changing Cause of Action: Substituting One Party Defendant for Another.** In a suit against the "Chicago and Alton *Railroad* Company," a corporation, the petition stated a cause of action against it, and that corporation answered to the suit. The plaintiff, on motion, was permitted to amend its petition, the original summons and the return of the sheriff, showing that the defendant was the "Chicago & Alton *Railway* Company," another corporation. The substituted defendant, after an unavailing motion to strike out its name as defendant in the petition, writ and return, filed an answer to the amended petition, containing a general denial and plea in abatement to the jurisdiction of the court. *Held*, that the amendment substituting one defendant for another was the substitution of a different cause of action from that set forth in the original petition and should not have been permitted without proof of the averments of plaintiff's motion to amend, showing that the last named corporation was the one served with process.

2. **PRACTICE: Plea in Abatement: Waiver.** A defendant does not waive his right to plead in abatement of the action by pleading in bar and proceeding to trial upon the merits, but may unite in the same answer matter in abatement with matter in bar.

3. **MALICIOUS PROSECUTION: Malice and Want of Probable Cause.** In an action for damages for malicious prosecution, the plaintiff, in order to maintain his action, must allege and

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prove, on the part of the defendant, both that the prosecution complained of was malicious and that it was without probable cause, though malice may be inferred from facts which show want of probable cause.

4. ———: ———. The evidence in this case is examined and shows conclusive proof of probable cause, that it was wholly without malice and the verdict wholly unsupported by the evidence.

Appeal from Audrain Circuit Court.—*Hon. E. M. Hughes,* Judge.

REVERSED.

*F. Houston* for plaintiff in error.

(1) There is no power possessed by a court, or by a judge, to substitute a right party for a wrong party, plaintiff or defendant. This is a plain case of the substitution of a new party by the court, and not a question of amendment as counsel for defendant in error contends. Dicey on Parties, p. 522, rule 114; Thompson v. Allen, 86 Mo. 85, citing 73 Mo. 688; Hajek v. Benevolent Society, 66 Mo. App. 568. (2) Nor does the defendant waive its right to plead to the jurisdiction by answering on the merits, or by failing to except, or by answering over and including in its answer a renewal of its plea to the jurisdiction, or by answering to the merits. Christian v. Williams, 35 Mo. App. 297; Byler v. Jones, 79 Mo. 261. (3) In an action for malicious prosecution, as this is, both malice and want of probable cause must be shown—want of probable cause alone is not sufficient—malice is also necessary and must be shown. There must be affirmative proof of both these facts. They must be shown as any other facts and both must concur. Riney v. Vallandingham, 9 Mo. 816; Frissell v. Relfe, 9 Mo. 860; Hill v. Palm, 38 Mo. 13; Sparkling v. Conway, 75 Mo. 512; Scovill v. Glasner, 79 Mo. 449; Moody v. Deutsch, 85 Mo. 237; Peck v. Chouteau, 91 Mo. 138; Grant v. Rinhart, 33 Mo. App. 74. (3)

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The plaintiff must show malice in beginning or continuing the prosecution. Without malice there can be no recovery. Sharpe v. Johnson, 59 Mo. 557; s. c., 76 Mo. 660; Van Sickle v. Brown, 68 Mo. 627; Nolen v. Kaufman, 70 Mo. App. 651. (4) Malice means that the wrongdoer not only intended to do the act shown to be wrongful, but also that he knew it to be wrongful when he did it. Witaschick v. Glass, 46 Mo. App. 209. While malice might be inferred from want of probable cause, the want of probable cause can not be inferred from proof of malice; and there is absolutely no proof of any malice whatever in this case. Casperson v. Sproule, 39 Mo. 40. The defendant is not required to prove want of both malice and probable cause. If either is wanting, the action must fail. Renfro v. Prior, 22 Mo. App. 403. (5) Plaintiff's guilt is not a controlling issue. Malice and probable cause are the controlling factors. Malice must be shown. It is not a legal inference. And when good faith in beginning or continuing the prosecution is shown, no malice can arise. McGarry v. Railway, 36 Mo. App. 340; Talbott v. Plaster Co., 86 Mo. App. 558.

*P. H. Cullen* for defendant in error.

(1) The court did not err in permitting plaintiff to amend his petition, etc., so as to make the name of the defendant read the Chicago & Alton *Railway* Co. instead of the Chicago & Alton *Railroad* Co. R. S. 1889, sec. 657; Railroad v. Prapst, 83 Ala. 518; Railroad v. Mahoney, 89 Tenn. 311, 15 S. W. 652; Parks v. Railroad, 59 Am. & Eng. R. Cas., 616, 82 Wis. 219; Railroad v. Rohrman (Pa.), 12 Am. & Eng. Cas., 177; Railroad v. McCall, 89 Ala. 375; Johnson v. Railroad, 74 Ga. 397; Chicago v. Railroad, 89 Ind. 88. (2) The Missouri doctrine is as liberal as the doctrine of any other State. Green v. Supreme Lodge, etc., 79 Mo. App. 181; School v. Wallace, 75 Mo. App. 317; Davis v. Boyce, 73 Mo.

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App. 563; Meyer Bros. v. Ins. Co., 73 Mo. App. 166; Whitehill v. Keen, 79 Mo. App. 125; Colbert v. Railroad, 78 Mo. App. 178; Fears v. Riley, 148 Mo. 59; Weber v. City of Hannibal, 83 Mo. 262; State v. Shelby, 75 Mo. 482; Holders v. Julian, 53 Mo. 241; Battle v. Hill, 60 Mo. 72; Lilly v. Tobbeen, 103 Mo. 477; Stone v. Ins. Co., 78 Mo. 655; Evoy v. Express Co., 21 N. J. Sup. 641. (3) The record shows that appellant answered the amended petition and submitted itself to the jurisdiction of the court and thereby waived all right, if any it had, to object to the ruling permitting the amending of the petition, etc. Mankameyer v. Egelhoff, 161 Mo. 200; Hurley v. Railway, 57 Mo. App. 680. (4) Malice may be established to such an extent as to support an action of malicious prosecution, although there is no proof of personal hatred, ill will, spite or vindictiveness. Haddrich v. Heslop, 12 Q. B. 267, 64 E. C. L. 267; Johnson v. Eberts, 11 Fed. 217; Lunsford v. Deitrich, 93 Atl. 565, 30 Am. St. Rep. 79; Foster v. Pitts, 63 Ark. 387; Harpham v. Whitney, 77 Ill. 32; Burhans v. Sanford, 19 Wend. (N. Y.) 414; Gee v. Culver, 13 Ore. 598; Forbes v. Hogman, 75 Va. 168; Speers v. Hiles, 67 Wis. 350. (5) In the action under consideration malice has a technical meaning and the defendant railroad correctly defined it in its own first instruction. Stockley v. Hornridge, 8 C. & P. 1134, E. C. L. 272; Noble v. White, 103 Iowa 361; Beiring v. Galveston Bank, 69 Tex. 599.

STATEMENT.

This proceeding was inaugurated December 7, 1900, returnable to the January term, 1901, for damages for malicious prosecution upon charges of petit larceny alleged to have been committed July 5 and 7, 1900; the suit was brought against the Chicago & Alton Railroad Company, and the summons was issued against and the



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return showed services upon the railroad company, which was alleged to be a corporation under the laws of the State of Illinois. At the return term the railroad company, defendant, answered by a plea in abatement, averring that it appeared for that purpose only and that plaintiff ought not to have or maintain the action for the reasons that at the time of the commencement thereof, defendant was a corporation under the laws of the State of Illinois and was not at the time of the alleged injuries, nor had it since been, nor was it then operating a railroad or doing business in the State of Missouri, and the answer concluded with a general denial. Thereupon plaintiff moved to allow the amendment of the petition, summons and return in the cause by correcting (as averred) a mistake in the name of the defendant in this, that therein the defendant was named the "Chicago & Alton Railroad Company" and that the real name of the defendant was the "Chicago & Alton Railway Company" and that the latter was the corporation sued and intended to be sued, and the summons was actually served upon an agent of the Chicago & Alton Railway Company, which is an Illinois corporation, and that in calling the defendant a railroad company instead of a railway company, plaintiff made a mistake; but that the Chicago & Alton Railway Company was then and had been for a long space of time known as the Chicago & Alton Railroad Company, and by such last named title, defendant had transacted its business and exercised its corporate franchises and proclaimed to the plaintiff and the public that its real name was the "Chicago & Alton Railroad Company" and was better known and conducted more business under said last name than under its legal name, by all of which plaintiff was led into the error of calling it "railroad" instead of "railway" company.

This motion without any evidence thereon was sustained, plaintiff granted leave to file an amended peti-

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tion, and amend the original summons and return, and the sheriff, by leave of court, amended his return on the original summons, to which action and the rulings of the court in sustaining such motion and substituting the name of the Chicago & Alton Railway Company for that of the Chicago & Alton Railroad Company, as defendant in the original writ of summons and return filed, and in permitting plaintiff to amend such petition, writ and return, defendant duly saved its exceptions.

The clerk of the court, in turn, amended the original writ by substituting for the words "Chicago & Alton Railroad Company" as originally written, the words "Chicago & Alton Railway Company" over the exceptions of defendant. Thereupon plaintiff filed an amended petition, substituting the Chicago & Alton Railway Company as defendant, in lieu of the railroad company, but no summons was issued for the substituted defendant. Defendant then filed a motion to strike out its name as defendant in the amended petition, writ and return, alleging its appearance for that purpose only, and assigning that the original petition stated a cause of action against the Chicago & Alton Railroad Company, a different corporation also existing under the laws of the State of Illinois, and the original writ in the cause was issued against, directed to and summoned the Chicago & Alton Railroad Company, and the original return on such original writ showed service upon the Chicago & Alton Railroad Company to appear and answer said original petition, and the Chicago & Alton Railroad Company appeared and answered the original petition, and the court had no power to allow the amendment of the original petition, writ and return by substituting the name of the Chicago & Alton Railway Company as party defendant, for that of the Chicago & Alton Railroad Company; for the Chicago & Alton Railway Company had not been served with process as required by law, nor had it appeared therein, the suit and sum-

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mons being directed against another company the recent lessor, and the substitution of the Chicago & Alton Railway Company for the original defendant railroad company by amendment, was a substitution of one cause of action for another and of one defendant for another. The court refused to permit the introduction of the evidence tendered to sustain such motion and overruled it, and the defendant railway company filed a motion to quash the sheriff's amended return, assigning that neither upon the face of the return nor upon the face of the petition and writ served as shown by the original petition, writ and return thereto attached, had a petition or writ directed to the defendant been served by the sheriff as shown by the original return, but the original petition and writ so served by the sheriff were directed to and against the Chicago and Alton Railroad Company, and no petition and writ of summons had been issued from the court against the Chicago & Alton Railway Company, nor had any copy of any petition or writ against the Chicago & Alton Railway Company been served upon the agent of the Chicago & Alton Railway Company, except the original petition and writ against the Chicago & Alton Railroad Company, nor had any copy of the petition and writ as amended, making the railway company defendant in the cause, ever been served upon defendant, all such facts appearing by the pleadings, writs and returns, original and amended.

The court refused to hear the evidence offered to establish the grounds assigned, and overruled the motion to quash the amended petition, writ and return, and the defendant filed an answer to the amended petition, again pleading in abatement that the court had no jurisdiction in the cause over defendant, the railway company, because the original petition therein stated a cause of action against the Chicago & Alton Railroad Company, another corporation, and the original writ in the

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cause was issued against, directed to and commanded such other corporation, the Chicago & Alton Railroad Company, to appear and answer therein; that the original return on said original writ recited and showed service upon the Chicago & Alton Railroad Company, which appeared and answered such original petition; that the court had no power to allow the amendment of such original petition, writ and return by substituting the name of the Chicago & Alton Railway Company as party defendant for the name of the Chicago & Alton Railroad Company; that the Chicago & Alton Railway Company since the filing of the petition had not been served with process as required by law, nor had it appeared except by this answer under compulsion of the court, and that the substitution of the railway company for the original defendant, the railroad company as defendant, by amendment, was a substitution of one cause of action for another and of one defendant for another, without the service of process as required by law.

Defendant incorporated in the same answer, in addition to the foregoing plea in abatement, a general denial and an affirmative plea of good faith on its part, and that the prosecution was instituted by the duly qualified and acting prosecuting attorney of Audrain county, upon a full investigation of the facts.

A motion to strike out the plea in abatement as constituting no defense to plaintiff's cause of action was filed and sustained by the court over defendant's exceptions, and the cause proceeded to trial before a jury, the issues being joined by a general denial by way of reply, and a verdict for plaintiff for $250 compensatory damages and $750 punitive damages, was awarded.

REYBURN, J. (after stating the facts as above). —1. The statutory provisions governing amendments are very liberal in this State and are intended to cure defects of form and in many instances upon timely ap-

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plication, to afford relief against, and permit many corrections of errors of substance. But the section, 657, invoked in support of the action of the lower court, excludes and in terms prohibits amendments which substantially change the cause of action or defenses thereto even before judgment; and thereunder a party can not be permitted to substitute a different cause of action in an amended petition from that set forth in the original petition. Heman v. Glann, 129 Mo. 325.

Herein the original petition declared upon a cause of action against one corporation, and the amended petition recited a cause of action against a different corporation of a similar corporate name. When the original defendant filed its answer, the action of respondent was in effect an admission of the facts therein pleaded in abatement; it then became apparent that in bringing suit against the owner, formerly operating the railroad and lessor of the present defendant, the wrong party had been brought into court and the cause of action, if any existed, was against the lessee and successor in the conduct and control of the railroad whose agents and servants' actions were the subject of complaint. Had plaintiff, on discovering the error, dismissed as to the defendant first named, it is manifest that the court would have been powerless to permit an amendment of the petition naming as defendant therein the present appellant, and bring the latter into court without a writ of summons against it by name, yet in substance and effect, no different situation would under such condition have been presented than is now exhibited here. The defendant against which the action was brought and the process of court was directed, appeared and presented reasons which, if established or conceded, precluded the further successful prosecution of the action; and plaintiff recognizing the force of the defense presented, abandoned the proceeding against the defendant appearing and invoked the aid of the court to interpose

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another and different corporation as defendant to the action already pending, in lieu of the defendant then before the court. No cause of action was contained in the original petition against the substituted defendant, nor was any recovery possible against it thereunder and it would seem plain, therefore, that if the plaintiff intended to prosecute the action against the new defendant, legal process issued against it and service thereof according to law were as essential prerequisites as the amendment of the allegations of the complaint to comprehend the defendant and to bring it within the jurisdiction of the court. The appellant was not before the court, either by service of summons or by voluntary appearance, the only two methods by which personal jurisdiction can be lawfully obtained. A change of defendants was such a substantial change of the plaintiff's claim as to constitute a new action, and an amendment of the original petition for such purpose is not warranted by the law of amendments and should not be tolerated.

In the case of Green v. Supreme Lodge, etc., 79 Mo. App. 179, to which we are referred, the defendant's full corporate name was not recited, and the plaintiff was merely permitted to perfect it by amendment. The authority is not in point in support of the power of amendment extending to the length of substituting another defendant in lieu of the defendant answering and before the court. If the railway company was the corporation in truth and in fact sued and the summons was actually served upon its agent, in such event upon due proof of those facts, the action of the lower court might have been justified; but the court was not warranted in assuming the truth or existence of the averments of plaintiff's motion to amend without proper proof and erred in sustaining it without hearing testimony.

2. The appellant had reserved and insisted on its rights throughout to plead to the jurisdiction and ex-

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pressly appeared specially for that purpose, nor was it put upon the election at its peril, after the plea in abatement and motion to quash had been overruled, to abide by such action and decline to plead over, or by pleading in bar waive its rights in abatement and proceed to trial upon the merits. By reserving its plea to the jurisdiction in the answer, its rights were preserved and not waived thereto by pleading to the merits. The rule is not uniform and varies in other jurisdictions; but in this State under the latest decision of the Supreme Court, a defendant may unite in the same answer, matter in abatement with matter in bar. Christian v. Williams, 111 Mo. l. c. 443.

It follows, therefore, that after the adverse ruling of the court upon the objection to the illegality of the service, defendant expressly reserving all right to such objection did not abandon the plea in abatement by answering to the merits and going to trial thereon, and especially would such position appear tenable and reasonable where, as in this State, the right of appeal is not conferred from an order of the trial court overruling the plea in abatement. Cyclopedia of Law & Procedure, vol. 1, Abatement & Revival, pp. 130, 136 and cases cited. Johnson v. Detrick, 152 Mo. 243.

3. The evidence disclosed that the defendant had employed a special agent to investigate, at directions of its superintendent, losses occurring of its property and after preliminary examination and inquiry, such agent made an affidavit upon which an information was prepared by the prosecuting attorney of Audrain county, and a warrant charging plaintiff, now deceased, with petit larceny issued by a justice of the peace before whom a trial resulted in acquittal of the accused. It has been held repeatedly by the Supreme Court of this State that malice and want of probable cause are both essential elements, which must concur in an action for malicious prosecution, although the former may be an

inference from the proof of facts establishing want of probable cause. "In order to support such an action as that of the case at bar, two ingredients must come together: first, malice on the part of the prosecutor: second, want of probable cause for the prosecution. Absent either of these, the action for malicious prosecution fails. But when you establish proof of want of probable cause, then the jury may infer malice from the facts which go to make up such proof of such want. And where there is affirmative proof of the want of probable cause, then a defendant can be called on for his defense." Stubbs v. Mulholland, 168 Mo. 47. Again, "It is a proposition too well settled to require the citation of any authorities in its support, that the existence of malice and the want of probable cause are both necessary to the maintenance of an action for malicious prosecution. They are distinct and essential ingredients of this private wrong. If there be reasonable or probable cause, no malice, however distinctly proved, will make the defendant liable. The proof of malice does not establish the want of probable cause, nor does the proof of want of probable cause necessarily establish the existence of malice. That is to say, malice is not an inference of law from the want of probable cause. Malice, however, need not be proved by direct and positive testimony, but may be inferred from the facts which go to establish the want of probable cause; and this is all that is meant when it is said that malice may be inferred from the want of probable cause." Sharp v. Johnston, 59 Mo. 557.

We do not deem it necessary to summarize the facts exhibited by this record, but consider it sufficient to state that there is abundant and conclusive proof of probable cause, and that the special agent of defendant, in making the affidavit acted cautiously, wholly without malice toward the accused, who was unknown and a stranger to him, but with a reasonable and justifiable

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belief and upon probable cause of the guilt of the accused, a belief shared by the prosecuting attorney as shown by the latter in preparing and filing the information. The verdict is wholly unsupported by the evidence, the demurrer to the evidence should have been sustained and the judgment is accordingly reversed. *Bland, P. J.*, and *Goode, J.*, concur.

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STATE OF MISSOURI ex rel. HIXSON, Respondent, v. NERRY et al., Appellants.

**St. Louis Court of Appeals, March 1, 1904.**

1. **MANDAMUS: Action at Law: Abstract of Record.** A proceeding for a writ of mandamus, commanding a county treasurer to pay a warrant drawn by a county board of education on funds in his hands, is an action at law, and not an equitable action requiring the whole of the testimony to be presented in an abstract of the record for review of the appellate court.

2. ———. Such an action will lie to compel a county treasurer to perform his ministerial duty, the payment of a warrant, drawn by proper authority, upon a fund in his custody which is legally applicable to its payment.

3. ———: **Not an Equitable Action: Interplea.** And such proceeding can not be converted into an equitable action by the return of the officer to such a proceeding, showing that strangers claim the fund upon which the warrant is drawn; nor can the court order such strangers, to appear and interplead for it.

Appeal from Scotland Circuit Court.—*Hon. E. R. McKee*, Judge.

AFFIRMED.

*E. Scofield* and *John M. Doran* for appellant.

*J. M. Jayne* and *J. E. Luther* for respondent.

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STATEMENT.

In February, 1902, this proceeding was begun in the circuit court of Scotland county, by relator, Hixson, against the respondent, as treasurer of Scotland county. Relator, James T. Hixson, averred that respondent, L. N. Kinney, was treasurer of Scotland county, that Arminta B. Nerry, C. E. Smith and relator composed the county board of education of Scotland county and were authorized by law to hold county institutes, and pay their expenses out of the money collected from the teachers attending. That defendant had in his hands two hundred and seventy-six dollars thus collected, the fund collected from the teachers at the institute being required by law to be turned over to the county treasurer. That it was the duty of such board to meet and audit the charges of the instructors, employed for such institute, and other necessary expenses together with their own expenses, and draw warrants therefor upon such treasurer. That the board convened December 21, 1901, and drew a warrant on respondent as such treasurer for $119.45, made payable to relator, for purpose of paying the instructors of the county institute, that such warrant was legally issued and signed by a majority of such board, and such majority was authorized under the law to transact all business coming before the board. That relator presented such warrant to respondent, who refused its payment. An allegation that the relator was without remedy through ordinary proceedings at law, and a prayer for a writ of mandamus enjoining payment of the warrant concluded the petition.

On the eighth of February, 1902, the respondent made a return admitting he was treasurer of Scotland county, that the parties named constituted the board of education of the county, and were empowered to hold county institutes and pay expenses out of the money

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paid respondent by teachers of the county for such purpose; admitted that it was the duty of such board to appropriate all such funds to the purpose for which they were intended, and that about December 21, 1901, a warrant for the sum stated payable to relator, signed by relator and C. E. Smith, was presented for payment. Proceeding, the return contained allegations of the collection from the teachers of the county of $331.50, that other warrants aggregating fifty-five dollars and described were presented and paid. That under the law such fund should be applied to the payment of instructors and conductors in the institute, a part to payment of Smith and Hixson for their services as members of the board, and a part to pay the compensation of the county commissioner. That the board was unable to agree upon the method of distribution; relator, Smith and Nerry claiming various sums named as instructors, members of the board and county commissioner. The return concluded with further specific averments of menaces by the three parties to hold respondent personally responsible for the several amounts respectively claimed by them, and his ignorance of the lawful division of the fund, his willingness to disburse it under the directions of the court, and a prayer that the other parties be required to appear and establish their respective claims. Upon this return the court made an order February 27, 1902, requiring Arminta B. Nerry to be notified and show cause, why the writ should not issue as prayed, and March 15th following, an elaborate answer, as it was denominated, was filed on her behalf. After hearing the evidence offered by the opposing parties, the court rendered judgment awarding relator a peremptory writ of mandamus against the treasurer directing him to pay the warrant presented from funds in his hands. Arminta B. Nerry filed a separate motion for a new trial, which was overruled as was a motion on her behalf in arrest, and an appeal was allowed her, the

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judgment, rulings on motions, and appeal all being had on August 27, 1902, the bill of exceptions being completed and filed March 28th thereafter.

REYBURN, J. (after stating the facts as above). —1. The relator has asked this court to dismiss the appeal, charging non-observance of rule of this court by appellants; the failure by appellant to present the whole of the testimony as required for review of an equitable proceeding and finally that the appeal was allowed August 27, 1902, returnable to the April term, 1903. While the printed abstract is not complete, we should hesitate to summarily dispose of the case by dismissal of the appeal solely upon that ground, and while the misapprehension that this has been converted into a proceeding in equity by reason of the *quasi* interplea of appellant filed in response to order directed to her to show cause, is but natural, yet as presently determined the full proceedings in the trial court are not essential, for the proceeding is not equitable but at law. Finally, if respondent desired to avail herself of the failure by appellant to perfect her appeal with diligence and dispatch, the statutory requirements should have been followed, preliminary to such motion.

2. The extraordinary remedy here invoked by respondent has been defined, "a command issued from a court of law of competent jurisdiction in name of the State directed to some inferior court, officer, corporation or person requiring them to do some particular thing, therein specified which appertains to their office or duty." 19 Am. and Eng. Ency. (2 Ed.), p. 16; High, Ex. Rem. (3 Ed.), sec. 1. The subject of mandamus in this State is treated in chapter 49, R. S. 1899, which is made up of brief sections prescribing the method of pleading and procedure, with provisions governing award of costs, but in nowise enlarging the scope or amplifying the application of the remedy. The origin,

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history and nature of the writ of mandamus will be found interestingly discussed by the Supreme Court in the case of State ex rel. The Laclede Bank v. Lewis, 76 Mo. 370, in which the definition of the eminent commentator above cited is adopted, which varies in no substantial respect from that quoted, and the conclusion, as therein announced, stated that it is regarded in modern times as in the nature of an action by the party in whose favor the writ is granted, for the enforcement of a right in cases where the law affords no other adequate means of redress. That it lies in those cases, of which this is a type, involving merely the performance by a county official of his plain ministerial duty of payment of a warrant drawn by lawful and proper authority upon a fund in his custody, legally applicable to its payment and requiring the exercise of no official discretion on his part, can not be reasonably questioned. Spelling, Injunction and Extraordinary Remedies (2 Ed.), chap. 46, sec. 1480, et seq.; 19 Am. and Eng. Ency., p. 790, and authorities cited. State ex rel. v. Adams, 161 Mo. 349; State ex rel. v. Thomas, 43 Mo. 228; State ex rel. v. Draper, 48 Mo. 213; State ex rel. v. Mason, 153 Mo. 23; Am. and Eng. Ency., supra, 789.

We have searched in vain for any lawful authority, by which such a proceeding as inaugurated by relator, could be converted into an equitable action, the public disbursing officer changed to a stakeholder of public funds held for specific educational purposes and strangers required to appear and interplead for relief of the respondent, the officer against whom the writ was asked. Upon the allegations of the return of the county treasurer, the relator was entitled to a peremptory writ. State ex rel. v. Adams, supra. The point, sought to be made by appellant in behalf of the official, that the costs of the proceeding were awarded against him by the judgment of the circuit court, is fully met by the suggestion that no complaint by him through exception to any rul-

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ing on appeal appears. We would add that the finding upon the facts by the trial court is approved, and the judgment thereon was correct.

The judgment is affirmed. *Bland, P. J.*, and *Goode, J.*, concur.

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## KITCHENS et al., Respondents, v. TEASDALE COMMISSION COMPANY, Appellant.

**St. Louis Court of Appeals, March 15, 1904.**

1. **BANKS: Misappropriation by Cashier: Notice.** The cashier of a bank drew, over his official signature, drafts upon the bank's correspondents in distant cities, and transmitted them to the defendant, a commission company, which collected them and used the proceeds, under the instructions of the cashier, on his individual account, in grain speculations, whereby the money was lost and the receivers of the bank, after its failure, sued the defendant for the proceeds of drafts. *Held*, the manner in which the money was transmitted was notice to the defendant that the cashier was using the funds of the bank on his individual account. *Held*, further, though the directors of the bank were guilty of gross neglect in their careless supervision of the business, and permitted the cashier to have exclusive management of its affairs, this constituted no defense. *Held* further, that the defendant, commission company, having notice of the misappropriation of the funds by the cashier, was liable for the amount thus misappropriated.

2. ———: ———: **Evidence: General Denial.** The answer of the defendant being a general denial, with no offer to amend, evidence of a secured note given by the cashier and accepted by the directors of the bank in settlement of the claim, was properly excluded.

3. ———: ———: ———. Expert testimony to the effect that it was a general custom for cashiers of banks to draw drafts upon their own banks in payment of their own indebtedness, was not admissible.

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Appeal from St. Louis City Circuit Court.—*Hon. H. D. Wood*, Judge.

AFFIRMED.

*R. F. Walker* for appellant.

(1) Appellant should have been permitted to introduce evidence to show that the board of directors were negligent in their duty in permitting the cashier, W. H. Ritter, to have the entire care and management of the bank. If directors permit a cashier to pursue a line of conduct for a considerable period of time the bank will be bound by his acts. The cashier's authority may be implied from the conduct or acquiescence of the corporation, as represented by its board of directors. Martin v. Webb, 110 U. S. 7; s. c., 28 Law Ed. 49. (2) The appellant should have been permitted to show that W. H. Ritter, the cashier, subsequent to the drawing of the last draft in question, gave his note for five hundred dollars secured by collateral worth more than the note, to the bank, and that the same was accepted by the board of directors. While it is generally true in an action to recover money the defense of payment is not admissible under a general denial, yet where the fact of nonpayment is stated in the petition, as was done in this case, as a material averment of plaintiff's cause of action a general denial will suffice to authorize defendant to show a payment or settlement. State ex rel. v. Peterson, 142 Mo. 526; Wheeler v. Tinsley, 75 Mo. 458; Knapp v. Roche, 94 N. Y. 333.

*F. H. Sullivan* for respondents.

(1) The form of these drafts, remitted on personal transactions of the cashier, was notice to appellant that he was using the funds of the bank for his own purposes, and appellant was properly held liable to refund the

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amounts. Lee v. Smith, 84 Mo. 305; Anderson v. Kissan, 35 Fed. 699; Lawson v. Beard, 94 Id. 30; Mendel v. Boyd, 91 N. W. (Neb.) 860; Campbell v. Bank, 67 N. J. Law 301; Express Co. v. Hough, 3 Ohio *nisi prius*, 301; Bolles Bank Officers (Ed. 1890), p. 276, sec. 559; p. 277, sec. 560. (2) (a) Negligence of directors no defense. (b) And if it was, it could only be available as an estoppel by showing that appellant's conduct was influenced thereby. Estoppel was not pleaded, and hence was not available as a defense. Sanders v. Chartrand, 158 Mo. 352. (c) The drafts were recorded on the books of the bank as having been issued to others than appellant, and the bank's officers could not be charged with negligence for failing to ascertain the true state of facts. (3) No subsequent settlement of the matter of these drafts was pleaded, and hence no such could have been shown. Greenway v. James, 34 Mo. 328; Hardwick v. Cox, 50 Mo. App. 513; Mfg. Co. v. Cunningham, 73 Mo. App. 380; Jones v. Rush, 156 Mo. 371. (4) A custom to affect right must be certain, reasonable and uniform in the particular locality and not contrary to law. Ober v. Carson, 62 Mo. 214; Cotton Co. v. Stanard, 44 Mo. 83; 27 Ency. Law (1 Ed.), p. 782.

STATEMENT.

This action was by the respondents, as receivers of the Greene County Bank, upon five drafts substantially in the form following:

"Greene County Bank.

"Paragould, Arkansas, Dec. 8, 1899.

"Pay to the order of J. H. Teasdale Commission Company three hundred dollars.

"To Western National Bank,

"New York City.

"W. H. Ritter,

"No. 6160. Cashier."



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The petition was subdivided into five counts with modifications appropriate for varying dates of December, 1899, and January, 1900, amounts and drawee; two of the drafts being upon the Western National Bank, New York, and the remaining three upon the Merchants Laclede National Bank, St. Louis, and all were remitted to appellant by their maker and drawer, W. H. Ritter, cashier, and collected and placed to his individual account with appellant, in speculative personal operations in grain conducted by him through the commission company. The proceeds of these remittances were absorbed and lost in these ventures, saving a trifling balance repaid Ritter. The drafts were drawn and executed by Ritter and entered in a book of account with the bank, in which he was required to record exchange drawn; the bank had never conferred any authority upon Ritter to employ its funds for his own purposes, and subsequent to its suspension it was discovered that these drafts were drawn in favor of appellant in lieu of the payees, in whose names they were entered in the exchange ledger. Ritter was cashier at dates of the drafts and had occupied such official position for several years preceding. The book of account containing the personal account of Ritter displayed, that from the first day of December, 1899, to the same date in February, 1900, his account had been overdrawn and the largest amount to his credit at any one time had been but little in excess of one hundred dollars, which had been applied shortly after its receipt upon a transaction other than those here involved, and none of these drafts appeared charged against his account. It was apparent from the testimony that to the cashier was confided the general charge and management of the bank, the directory meeting irregularly and infrequently. It was further manifested in evidence that the dealings of appellant with the insolvent bank were confined to the re-

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ceipts of the drafts in question, except that it had forwarded the bank collections and received remittances therefrom in form of similar drafts. The officer of defendant handling the transactions with Ritter, also stated that appellant was aware in receiving these drafts that the bank was drawing against its deposit in other banks in favor of appellant, in personal transactions of its cashier in purchases of wheat and, dates and amounts accepted, the drafts received on the personal account of Ritter were the same in form as those remitted by the bank in payment of collections made by it for appellant's account, and he looked no further than to observe that the drafts sent by Ritter on his personal account were made out in the proper form. The court refused instructions at instance of defendant, to the effect that in dealing with Ritter in good faith, appellant was not required to look beyond the face of the drafts to determine whether he was authorized to draw and transmit them in payment of his personal obligations; also that if it was shown by the evidence that the directors entrusted the entire care and management of the business of the bank to the cashier, and it was his custom to draw drafts on the bank in payment of his personal obligations, then the directors would be presumed to have had knowledge of such custom and assented thereto, and defendant was not required to look further than the face of the drafts to determine the cashier's right to issue them; also that if the whole business of the bank was delegated to its cashier and the directors acquiesced in such exclusive management, and defendant dealt in good faith with Ritter, defendant was not required to make further inquiry as to the right of Ritter to draw drafts upon the bank in his own name in his own transactions, than that disclosed by the face of such drafts, and finally an instruction was refused based upon an adjustment with the board of directors by delivery and acceptance of a secured note of Ritter, and the court directed the

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jury to find a verdict for plaintiffs for the respective amounts of the several drafts with interest accrued.

REYBURN, J. (after stating the facts as above). —1. Appellant contends that it should have been permitted to introduce testimony to prove that the directors ignored their duties, and for a considerable period permitted the cashier to have entire management and conduct of the institution, and thereby the bank became bound by his actions. Although the members of the directory of the bank may have been guilty of culpable negligence or gross neglect by their careless supervision of the business, and disregard of their official duties, and permitted Ritter to have exclusive management of its affairs, which might have rendered them responsible to creditors or stockholders for the losses ensuing, yet their wrongful actions and neglect of duty constitute no defense to this action available in behalf of defendant. This proceeding is for the recovery of funds, confessedly known by appellant's officer, to have been the corporate property being then applied by its cashier to his personal speculations by draft upon its correspondents over his official title. By the medium adopted for the transfer of the money, defendant was apprised that Ritter by the abuse of his power as cashier was employing the funds of his principal in speculation on his individual account and in affairs which from their nature excluded the possibility of being concerns of the bank. That he was transcending the well known extent of his agency and using the money of his principal in his private transactions was manifest: in the unconcealed application of the funds known to be the bank's property to Ritter's individual affairs, there is no room for maintaining that the transactions were other than his own affairs not as cashier, but personally and individually. Appellant knew it was dealing with Ritter personally, and also knew the funds of the bank were used by him

for his own ends and that the funds were in course of deliberate misappropriation by betrayal of Ritter's trust. It is true that the transmission of cash, by means of draft of remitting bank through its cashier, drawn upon its depository correspondents at distant cities has been adopted so universally in the commercial world, that such instruments partake of the convenience and characteristics of currency itself, but if currency of the defrauded bank had in specie been forwarded direct to appellant by the cashier, Ritter for his own purposes, with notice or knowledge on part of the appellant of the ownership and rights of the bank therein, there could be no doubt of the obligation of appellant to make restitution of such sums, and in legal contemplation the situation here displayed is substantially the same as such illustration. The same rule of law governs the agency of a cashier, as applicable to any other fiduciary relationship, and the right of recovery of the principal's funds from the party obtaining them from the agent with the full knowledge of their misappropriation is too apparent to admit of reasonable debate. Nor is it clear that vigilance and due performance of their duty by the officers of the bank would have revealed the fraud being practiced, and the misappropriation of the funds by the cashier, as the record in the books of the bank of the drafts was falsified, and therein they purported to be drawn in favor of other payees than appellant. The legal principles governing the situation here presented have been recognized in this and other jurisdictions, and in other States decisions have been invoked upon facts strikingly analogous to those here exhibited. Lee v. Smith, 84 Mo. 304; Lamson v. Beard, 94 Fed. 30; Mendel v. Boyd, 91 N. W. 860; Anderson v. Kissam, 35 Fed. 699; Campbell v. Bank, 67 N. J. L. 301.

2. The appellant interposed as its answer a general denial and without amendment, tendered proof of a secured note given by Ritter after the last of the

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drafts had been transmitted and of acceptance by the directory in settlement. No application to amend the answer was made, and such testimony was properly excluded. The evidence sought to be admitted was not proof of payment, but so far as imperfectly disclosed, might have established a settlement of overdrafts and in absence of even a synopsis in the record of the form of plaintiff's statement of its cause of action, it can not be conjectured how the decisions appealed to by appellant are pertinent. The case of State ex rel. v. Peterson, 142 Mo. 526, merely declares that a special plea of payment is not essential, when the allegation of nonpayment is a necessary and substantial averment to constitute plaintiff's cause of action.

3. The testimony sought to be elicited from the banking expert, to the effect that it was a general custom for cashiers of banks to draw drafts upon their own banks in payment of their own indebtedness was not admissible. The drafts in question were not drawn in such form, and the line of inquiry not addressed to the state of facts developed, but if such custom prevailed and had been established, it would have been in violation of law and the legal consequence could not have been avoided, that the payee of such drafts would have been liable to repay to their actual owner such unlawfully diverted funds, under such facts as are disclosed here.

The judgment was for the right party and is affirmed. *Bland, P. J.*, and *Goode, J.*, concur.

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## FUHLHAGE, Appellant, v. NAGLE, Respondent.

**St. Louis Court of Appeals, March 15, 1904.**

**APPELLATE PRACTICE: Finding of Trial Court Conclusive.** The finding of a court, in a case tried without a jury, will not be reviewed by the appellate court when there is substantial evidence to support it.

Appeal from St. Louis City Circuit Court.—*Hon. Robt. M. Foster*, Judge.

AFFIRMED.

*Lon O. Hocker* and *P. A. Griswold* for appellant.

REYBURN, J.—This was an action by plaintiff for value of services computed at rate of two and one-half per centum upon purchase price contemplated in procuring buyer for realty designated as No. 4423, San Francisco avenue, in the city of St. Louis. It was developed that the St. Louis Colored Orphans' Home was willing to purchase the premises at $6,800, a price finally acceptable to defendant, the owner, but upon terms of $1,000 cash and balance in partial payments enumerated. The property, the subject of the sale, formed part of a larger tract burdened by a deed of trust and the proposed sale, after lengthy negotiations and protracted delays to permit adjustment of this mortgage indebtedness so as to afford relief from its lien as to the part to be sold, ultimately failed through inability of the defendant to make satisfactory terms with the mortgage creditor for release by partial payment. The trial progressed before the court sitting as a jury, and the finding and judgment awarded and rendered for defendant.

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Counsel for appellant conceded in argument that the issue presented to this court was of fact, rather than of law, and involved the verity attached by the trial court to the version of defendant, that the transaction was conditioned upon the ability of defendant with aid of appellant to handle the mortgage covering the whole realty, so as to relieve the portion to be sold and thus attain the conveyance of unencumbered title to the proposed purchaser: and it was further urged in appellant's interest that the judgment below was manifestly unjust, against the weight of the evidence, and unsupported except by the testimony of defendant. As has been frequently announced the court below was the trier of the facts and no right to reverse its finding is reposed in this court, unless the trial court manifestly acted arbitrarily or was plainly actuated by passion or prejudice in the conclusion reached, and no such situation is exhibited here. When a cause has been tried by the court without a jury, the finding will not be reviewed when there is substantial evidence to support it. Ellis v. Railway, 89 Mo. App. 241; Corrigan v. Kansas City, 91 Mo. App. 173. This court can not determine the weight of the evidence, the finding of the trial court is conclusive upon that question. Smith v. Royse, 165 Mo. 654. The testimony herein was in conflict, but the finding is sustained by substantial evidence and the judgment is affirmed. *Bland, P. J.*, and *Goode, J.*, concur.

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# McLELAND, Respondent, v. ST. LOUIS TRANSIT COMPANY, Appellant.

**St. Louis Court of Appeals, March 15, 1904.**

1. **ASSIGNMENT OF CLAIM: Unliquidated Damages.** A half interest in an unliquidated claim for damages for personal injuries is not assignable, and, under section 540, Revised Statutes 1899, the assignment of a half interest in such a claim to her attorney would not prevent the client from suing in her own name as the real party in interest.

2. **STREET RAILWAYS: Contributory Negligence: Question for Jury.** Where the plaintiff testified that she attempted to pass in front of a stationary street car, two feet distant, on a crowded street, and was injured by the sudden starting of the car, without warning, the question as to whether the plaintiff was guilty of contributory negligence, which proximately caused the injury for which she sued, was properly submitted to the jury.

3. ———: **Concurring Negligence.** But if the injuries were the result of the mutual and concurring negligence of the plaintiff and defendant's motorman, and either without the other would not have caused the same, the plaintiff can not recover, and it was error to refuse to so instruct the jury.

4. ———: **Departure: Instruction.** It was a departure from the issues presented by the pleading and the evidence to instruct the jury upon the theory that defendant was liable if the motorman could have stopped the car after he saw, or, by using ordinary care, could have seen her position of peril, the negligence assigned being the sudden starting of the motionless car, and there being no averment nor proof that the casualty resulted from failure to stop the car.

Appeal from St. Louis City Circuit Court.—*Hon. Franklin Ferriss*, Judge.

REVERSED AND REMANDED.

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*Boyle, Priest & Lehmann* and *George W. Easley* for appellant.

(1) The court erred in sustaining the plaintiff's motion to strike out the third paragraph of defendant's answer. The act of the Legislature (Sess. Acts 1901, p. 46) so far changes the common law rule that assignments of part of a claim for damages may be made. When made, as alleged in the paragraph of the answer stricken out by the court, the party to whom the assignment is made becomes so identified with the plaintiff as a party in interest that the attorney to whom the assignment is made must secure the costs, unless he is also in such condition that he may also sue as a poor person. Feil v. Railway, 119 Fed. 490. This makes the assignee the real party in interest, and he must join in the suit. R. S. 1899, sec. 540. (2) It was a case of mutual mistake or negligence and there can be no recovery. Hornstein v. St. Louis Transit Co., 70 S. W. 1105. The motorman had much more reason for believing that the plaintiff would remain standing than she had for thinking that the car would not stop. Cogan v. Railroad, 73 S. W. 738; Moore v. Railway, 75 S. W. 672. (3) The court erred in modifying instruction numbered 8, offered for defendant, by adding thereto the following: "Provided you further find that the motorman could not have stopped the car after he either saw, or could have seen by using ordinary care, that the plaintiff was in a position of peril." This proviso added to the instruction was a radical reversal of the issues made by the pleadings and is such error as demands a reversal. It authorized a recovery on a ground not alleged in the petition. Waldheir v. Railroad, 71 Mo. 514; Feary v. Railway, 162 Mo. 96. "A recovery could only be permitted on the ground alleged." Conrad Grocer Co. v. Railroad, 89 Mo. App. 542.

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*Fred L. Vandeveer* for respondent.

(1) The portion of defendant's answer referred to was very properly stricken out by the trial court. The answer charges that she did a thing which the law would not permit her to do, and which was, therefore, an impossibility. R. S. 1899, sec. 540; Snyder v. Railway, 86 Mo. 613; Davis v. Morgan, 97 Mo. 79; Alexander v. Railroad, 54 Mo. App. 66. (2) It is true the petition alleges that the plaintiff walked in front of the car while it was still. But, under the statute, the pleadings must be liberally construed. Cobb v. Railway, 149 Mo. 135. (3) When such a construction is applied to the petition, it will be seen that the gravamen of the offense charged is striking the plaintiff with the car. Beckers v. Lincoln R. E. & B. Co., 73 S. W. 581; Gannon v. Gaslight Co., 145 Mo. 502; Hoyberg v. Hensky, 153 Mo. 64.

STATEMENT.

On the twenty-sixth day of April, 1902, the plaintiff, Miss Lettie McLeland, a resident of Madison, Illinois, but familiar with the operation of street cars and a frequent visitor to St. Louis, about midday, walked northward on the west side of Broadway to the south side of Washington avenue. She narrates that she stopped at the corner, as she stated, to see where the cars were, and observed an eastbound car about the middle of the block towards Sixth street, and she then continued to within five feet of the track, waiting for the car to pass; it stopped to let two passengers off and plaintiff proceeded to cross the track and when about one-third of the way, the car was put in motion without signal, and starting forward struck plaintiff on the ankle and she fell backwards sustaining the injuries, the basis of this action. A police officer promptly rendered her assistance and declining his suggestion to have

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an ambulance summoned, with his aid, she took a Broadway car and though in pain crossed by the ferry homeward.

The petition, after formal averments of incorporation of defendant and its operation of the street railway system, thus presented her cause of action:

"That at said time Washington avenue, at the intersection of Broadway, at the place hereinafter mentioned, was an open public highway within the city of St. Louis; that on or about, to-wit, the twenty-sixth day of April, 1902, plaintiff was lawfully crossing from the south side of Washington avenue, to the north side and on the west side crossing, or passageway, when she was struck by one of the defendant's eastwardly bound cars in charge of an agent of the defendant; that the striking of plaintiff by said car was directly due to the negligence of the defendant's agent, the motorman in charge of said car, in the following particulars, to-wit:

"That as the plaintiff was crossing said eastbound track, and just as she was nearly across the same, the motorman in charge of a still and motionless car negligently, carelessly and recklessly caused the same to start, and to strike and injure plaintiff; that the motorman in charge of said car, prior to the striking of plaintiff, negligently failed to sound a gong or give other warning or notice of the fact that the said car was about to be put in motion and moved forward; that the defendant's motorman negligently and recklessly failed to keep a lookout for persons on or near the track on which his car was about to be put in motion and moved forward, when by the use of ordinary care in keeping a watch for such persons he would have discovered plaintiff in a position of danger, and would not have caused his car to move forward when plaintiff was upon or near said track, and in danger of being struck by said car, if it was started.

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"And the plaintiff avers that the striking of plaintiff by defendant's said car on said occasion was directly due to the aforesaid acts of negligence on the part of defendant."

The hurts inflicted were then detailed, damages in a substantial sum therefor charged and judgment prayed.

The answer incorporated a general denial, a plea of contributory negligence in that the alleged injuries were caused by her own negligence by going upon the track in front of a moving car at a time and place when and where she might have seen and heard the approaching car in time to have kept off the track and avoided the injury; and that she was further negligent, in getting into such proximity to such moving car that she stepped on the fender in front of it and was struck by the fender on the ankles and thrown down.

The answer also contained the following special plea:

"And for further answer, defendant says that this action is not prosecuted in the name of the real party in interest; for that, on or about June 12, 1902, said plaintiff sold, and by writing assigned to Henry B. Davis and Curtis Haydon, one-half of her said claim here sued upon, which one-half interest was in no event to be less than two thousand dollars. Defendant can not file herewith said written assignment, because the same is in the possession of and under the control of the plaintiff and her attorney in this cause and said Davis and Haydon."

A demurrer to the final paragraph of the answer was overruled, but a motion to strike it out as not stating facts sufficient to constitute a defense was sustained.

A jury trial resulted adversely to defendant, which has appealed.

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REYBURN, J. (after stating the facts as above). —1. The first contention of appellant is that the lower court erred in its ruling that the assignment of an interest in plaintiff's cause of action to her counsel, as pleaded, constituted no defense to the action. The legislation creating a lien in favor of the attorney upon the client's cause of action (Acts, 1901, p. 46), which was the subject of interpretation lately in this court (Young v. Renshaw, 102 Mo. App. 173), is not herein involved, for the conditions precedent to perfecting such lien imposed by the act of the Legislature are not averred to have been complied with. The decision of the Federal Court invoked by appellant, upon analysis, merely denies the right of a plaintiff to sue *in forma pauperis,* when it appears that such plaintiff has made a contract with her attorneys for a fee contingent upon recovery, holding that in such event as plaintiff represents not only her own but the interests of her attorneys as well, she is suing for herself and as trustee for them, and that while standing alone she might be entitled to sue as a poor person under the law, yet in her representative capacity she can not be poor, within the meaning of the act of Congress, unless the beneficiaries whom she represents are poor also, in no wise sustains the position of appellant but rather militates against it. Feil v. Railroad, 119 Fed. 490.

Section 540, R. S. 1899, provides that every action shall be prosecuted in name of real party in interest, except as provided in the succeeding section, which relates to executors, administrators and trustees of an express trust, and the final clause of section 540 expressly recites that it shall not be deemed to authorize the assignment of a thing in action not arising out of contract.

In Alexander v. Railway, 54 Mo. App. 66, involving a contract for professional services where the client

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had made an independent compromise, the court clearly holds that no causes of action are assignable, except such as survive the death of the plaintiff and that an action for personal injuries does not survive, and that there could be no assignment of a part of a claim, even though definite and fixed in amount, without consent of the debtor. It follows, therefore, that such attempted assignment of plaintiff's unliquidated claim was without the sanction of law in this State, and invalid, and the defense sought to be based thereon properly stricken out.

2. The next assignment of error presented, is that the usual peremptory instruction asked at close of plaintiff's case and repeated at close of all the testimony, should have been given. The only testimony on plaintiff's behalf describing the occurrence was to be found in her own narrative from which the statement of the case was compiled. From this testimony, it is disclosed that the car had stopped and while passengers were alighting, plaintiff sought to pass in front of the stationary car, which was started without any signal to her that it was about to move. It is no unfair deduction that the motorman saw or should have seen plaintiff's effort to get by the car, nor are we prepared to declare that in the most crowded portion of the city of St. Louis, a pedestrian, who seeks to pass in front of a non-moving car in plain view of the attendant in charge is attributable with such contributory negligence as to debar recovery.

Negligence has been concisely defined to be the absence of care according to the circumstances: at the intersection of Broadway and Washington avenue, the junction of two of the most prominent thoroughfares in the city of St. Louis in frequent and constant use by pedestrians and vehicles of every sort, defendant's motorman should have exercised a degree of care commensurate with the conditions attending the passage

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over Broadway by his car, being imputed the knowledge that the vigilance that might have sufficed in the less populous and travelled parts of the city would fall far short of constituting ordinary care in such thronged portions frequented by the public about the retail stores of the city, and where indeed the watchfulness exacted would vary at different hours of the day and even on different days of the week. Under such state of facts, where reasonable men might fairly differ in their conclusions, the question of due care or negligence on plaintiff's part was properly relegated to the jury.

3. The instructions composing the charge to the jury, additional to those involving the weight and value of the testimony of experts and the measure of damages, comprehended the following:

"If the jury believe from the evidence in this case that on or about the twenty-sixth day of April, 1901, the defendant was operating the street car mentioned in the evidence, within the city of St. Louis; and if the jury find from the evidence that Washington avenue at the intersection of Broadway, at said time, was an open public street within the city of St. Louis; and if the jury further find from the evidence that the plaintiff was walking north on the west side of Broadway, on a street crossing generally used by pedestrians, and that when she reached a point about five feet south of the defendant's eastbound track she looked and saw a car approaching on said track, and that said car came to a stop with its fender within a few feet of the said crossing over which plaintiff was about to pass, and that plaintiff, while exercising ordinary care continued her journey north and in front of said car, was struck by said car moving forward, and was injured; and if the jury believe from the evidence that defendant's agent, its motorman, saw, or by the exercise of ordinary care could have seen plaintiff while she was walking in front of said still and motionless eastbound car, and that she

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was in danger of being struck and injured, if said east-bound car should be caused to be moved forward, and thereafter the defendant's agent, its motorman, started said car forward and caused it to strike plaintiff, and that such conduct on the part of said motorman was negligence, then and in that case the plaintiff is entitled to recover.

"By the term 'ordinary care,' as used in these instructions, is meant that degree of care which an ordinarily careful and prudent person would exercise under the same or similar circumstances, and by the term 'negligence' is meant the absence of such care.

"It was the duty of plaintiff when she approached the crossing to look for approaching cars, and if she saw the car by which she was afterwards struck, before going upon the track, it was her duty to wait and allow the car to pass, and if you find that before starting across the track she saw the car in question a distance of about two feet, and that she knew said car was approaching upon the track she was about to cross, and that she stepped in front of said car and was thereby injured, she can not recover; provided you further find that the motorman could not have stopped the car after he either saw, or could have seen by using ordinary care, that plaintiff was in a position of danger.

"The burden is upon plaintiff to prove that her injuries, were caused solely by the negligence of the defendant and without fault or negligence of plaintiff and with fault or negligence on her part; and this burden rests upon the plaintiff, throughout the entire case, and if the jury find from the evidence that the negligence of the plaintiff as defined in the other instructions, wholly or in part caused or contributed to her injury, then the verdict will be for the defendant.

"The court instructs the jury that even though you believe from the evidence that the car in question



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was in motion when plaintiff attempted to cross the track, that even under such conditions, if the motorman saw the plaintiff, or by the exercise of ordinary care would have seen the plaintiff, crossing the track in front of said car and that he could thereafter, by the exercise of ordinary care, have stopped the car before striking the plaintiff, then it was the duty of the motorman to exercise ordinary care to stop the car in order to avoid striking the plaintiff; and if you believe from the evidence that the motorman failed to exercise ordinary care to avoid striking and injuring plaintiff, as aforesaid, then such conduct on the part of the motorman was negligent, and the plaintiff is entitled to recover."

The court refused the instruction asked by the defendant in the form following:

"If plaintiff's injuries were the result of the mutual and concurring negligence of the plaintiff and defendant's mortorman and that either without the other would not have caused same, then plaintiff is not entitled to recover."

In her conduct, as detailed by herself, as well as described by the witnesses who testified on behalf of defendant, the question of the negligence or want of care on part of plaintiff tending to bring about her injury, was a conspicuous issue confronting the jury, interposed in its defense by defendant. While in a measure this feature of the case is embraced in above instructions, especially in those portions declarative that the burden throughout rested upon plaintiff to establish that her injuries were caused solely by the negligence of defendant, and without fault or negligence on her part and referring the jury to other instructions, for definition of what constituted such negligence, yet defendant, as a matter of lawful right, was entitled to have the jury informed by a sharply defined and concise instruction, without qualification or obscurity, that if her

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injuries resulted from the concurrent and mutual negligence of both herself and the corporation defendant, the latter was not responsible to her therefor. The clause containing the proviso in above quoted instructions, and thus presented with the context:

"It was the duty of plaintiff when she approached the crossing to look for approaching cars, and if she saw the car by which she was afterwards struck, before going upon the track, it was her duty to wait and allow the car to pass, and if you find that before starting across the track she saw the car in question a distance of about two feet, and that she knew that said car was approaching upon the track she was about to cross, and that she stepped in front of said car and was thereby injured, she can not recover; *provided you further find that the motorman could not have stopped the car after he either saw, or could have seen by using ordinary care, that plaintiff was in a position of danger,*" and which modification is reiterated in the close of the instructions recited above, is independent of any support in the evidence and as well a departure from the issues presented by the pleadings and the theory of the trial. The statement of the occurrence by plaintiff evinced that the car had stopped two feet from the crossing upon which she started to pass over; there is no proof of the feasibility of stopping the car within such narrow space, if indeed to so stop it was physically possible; the negligence assigned was the act of the motorman in charge of a *motionless* car recklessly starting it and striking plaintiff, and there is no averment that the casualty resulted from failure to stop a moving car, and the recovery must be confined to the cause of action relied on in the petition, and the instructions restricted and directed to the issues made by the pleadings and the evidence in support of the allegations therein, and recovery can not be sustained, although upon a basis or a state of facts, which, if properly pleaded, might have

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exhibited a good cause of action. Chitty v. Railway, 148 Mo. 64; Bunyan v. Railway, 127 Mo. 12; Conrad Grocer Co. v. Railroad, 89 Mo. App. 534. While it might be doubted whether the declination of the instruction, in the form asked concerning contributory negligence, would have been error warranting a reversal, yet the infirmities in the instructions constituting a departure from the pleadings and evidence entitled the defendant to a retrial and the judgment is reversed and the cause remanded. *Bland, P. J.*, and *Goode, J.*, concur.

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BUFFALO FORGE COMPANY, Respondent, v. CULLEN & STOCK MANUFACTURING COMPANY et al., Appellants.

**St. Louis Court of Appeals, March 15, 1904.**

1. **CONTRACTOR'S BOND: Subcontractors May Sue On It.** Where public officials contract for a public improvement and exact from the contractor a bond, binding him to pay parties for labor and material furnished, such parties may sue on the bond as a contract made for their benefit. (Distinguishing State ex rel. v. Loomis, 88 Mo. App. 500.)

2. **———: ———: Assignment Clause.** Where such a bond, given by a contractor, contains a clause providing that it might be assigned by the obligee to subcontractors, material men and laborers, and stipulating that, in case of such assignment, it should inure to the benefit of all such parties alike, in proportion to their respective demands, but no assignment is made by the obligee, the subcontractor and materialmen may nevertheless sue on it as a contract made for their benefit.

Appeal from St. Louis City Circuit Court.—*Hon. J. R. Kinealy*, Judge.

AFFIRMED.

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*Paul Janis* and *J. M. Holmes* for appellants.

*Geo. W. Lubke* and *Geo. W. Lubke, Jr.*, for respondent.

GOODE, J.—The Cullen & Stock Manufacturing Company under its previous name of the Cullen & Stock Heating and Ventilating Company, made a contract with the board of education of the city of St. Louis, July 9, 1901, to construct and install in the Emerson school building a heating and ventilating apparatus for the sum of $11,387. The Cullen Company gave the board of education a bond with the City Trust, Safe Deposit and Surety Company of Philadelphia as surety. Said bond provided that if the principal in it, the Cullen Company, should perform its contract in full, pay all obligations incurred by it for labor and material used in the construction of the heating and ventilating apparatus, etc., it should be void. It contained besides, this clause:

"This bond may be assigned by the obligee to subcontractors, materialmen and laborers, who at the instance of the principal obligor have furnished work or material toward the completion of the contract; and in case of such assignment it shall inure to the benefit of all such parties alike, in proportion to their respective demands remaining unpaid."

The Cullen Company purchased from the plaintiff, the Buffalo Forge Company, a portion of the heating apparatus for the sum of $1,491, which was never paid, and this action was brought on the bond by the Buffalo Company to recover that sum.

The defendants filed answers, pleading the nonassignment of the bond by the board of education to the Buffalo Forge Company, and that portion of the answers was stricken out and an exception saved.

At the trial, the contract and bond were offered in

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evidence for the plaintiff, together with a stipulation admitting the purchase, sale and value of the materials sold by the plaintiff and that their price was due. The defendant then asked a declaration of law that under the evidence the plaintiff was not entitled to recover.

The court refused to give the declaration, entered judgment for the plaintiff and the defendant appealed.

The question presented for decision is, whether, in view of the assignment clause quoted above, the plaintiff had any right of action on the bond, it never having been assigned to plaintiff by the obligee, the board of education.

That a person to whom the principal is indebted for labor and material furnished in the construction of a building contemplated by a bond like the one in suit, except as to the assignment clause, may maintain an action on the bond, was decided in Lime & Cement Co. v. Wind, 86 Mo. App. 163, a case on an instrument in no respect different from this one, except that it lacked said clause. Other decisions uphold that remedy in favor of laborers and materialmen, for the reason that the lien statutes do not assist them to recover demands accruing in connection with the erection of public buildings. In such an instance if the public officials who contract for an improvement exact from the contractor a bond binding him to pay parties for labor and material furnished, such parties are allowed to sue on it as a contract made for their benefit, in discharge of a moral obligation to see that they are paid for what the public uses of their work or property; and a liberal interpretation of the provisions of the instrument is indulged in their behalf. No reason exists for denying the remedy to this plaintiff unless the assignment clause deprives him of it. It does not. Among others, the bond contains this condition:

"And if the said Cullen & Stock Heating and Ventilating Company shall repay to the said board of

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education of the city of St. Louis all sums of money which it may pay to other persons on account of the work and labor done, or material furnished, which said Cullen and Stock Heating and Ventilating Company may fail to do or furnish, and shall pay to the board of education of the city of St. Louis all damages it may sustain, by reason of the non-performance or malperformance on the part of the said Cullen & Stock Heating and Ventilating Company of any of the covenants, conditions, stipulations or agreements of said contract, including all alterations, modifications and additions, as aforesaid, and shall make payment to the parties furnishing the same for all materials used in the work provided for in the said contract and specifications hereunto annexed, including such alterations, modifications and additions, and for all labor performed on such work, whether by subcontract or otherwise, then this obligation shall be void; otherwise the same shall remain in full force and virtue."

That clause not only provided for the reimbursement of the board of education for money it might pay to other persons than the contractor for work and material, but provided also that the contractor of the Cullen Heating Company, should pay parties furnishing material and labor to be used in the building. By virtue of the lattter provision such parties acquired a right to sue on the bond as a contract intended for their benefit. The assignment clause enabled the board of education to insure uniform participation in the benefit of the bond by all creditors of the contractor for labor and material. It was not intended to make the right of a creditor to sue on the bond dependent on the will of the board further than might be necessary to put all creditors of the contractor on an equal footing.

We are not concerned at present with whether, if there were several creditors and the board refused to assign the bond, one of them could sue on it for his own

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benefit exclusively; for it does not appear that the contractor owes anyone except the respondent for labor and material.

We are cited by the appellant to the case of State ex rel. v. Loomis, 88 Mo. App. 500, as conclusive against respondent's right to maintain this action. The bond sued on in the Loomis case contained this term: "This bond is made for the use and benefit of all persons who may become entitled to liens under said contract according to the provisions of the law in such case made and provided, and may be sued upon by them as if executed to them in proper person." We held that clause designated the only persons, aside from the parties to the bond, who could sue on it, and that as Loomis had no lien, and, therefore, did not come within the designated class, he could not sue. It is true the building was a public one, and the bond was probably drawn under a misapprehension of the law, or a blank form used with said clause left in it inadvertently; but as courts must enforce contracts as they are made, we were compelled to deny that Loomis had a right of action on the instrument. That case resembles this one in no feature.

The judgment is affirmed. *Bland, P. J.*, and *Reyburn, J.*, concur.

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## SPERLING et al., Respondents, v. STUBBLEFIELD, Appellant.

St. Louis Court of Appeals, March 15, 1904.

1. **EXECUTION SALES: Purchaser With Notice.** One who purchased, at an execution sale, chattels which were in the possession of the execution defendant at the time of the seizure, under a lease from the owner with an option to buy, was not an innocent purchaser where he had notice before he bought, who the real owner was.

2. **JURISDICTION: Construction of Statutes.** Where terms of a circuit court were held at two places in the county, at one of which they were abolished by an act of the legislature providing that all causes pending there should be transferred to the circuit court at the other place, that being the county seat, a case at that time pending in the court of appeals, on appeal from a judgment rendered at the place where the terms were abolished, was within the provision of the act and the court at the county seat had jurisdiction.

3. **JUDGMENT: Nunc Pro Tunc Entry: Evidence.** A nunc pro tunc entry of judgment can not be made on oral testimony, but only on minutes or other written data appearing on the judge's or clerk's docket, the court records, or files and papers in the cause.

4. ———: ———: ———. Where there was a verdict, a motion in arrest stating that the "defendant comes and moves the court to arrest the judgment herein, etc.," and an order overruling the motion, they were sufficient evidence to support a finding that a judgment had been rendered, and authorized a nunc pro tunc entry.

Appeal from Stoddard Circuit Court.—*Hon. F. R. Dearing*, Judge.

AFFIRMED.

*Marsh Arnold* and *Ralph Wammack* for appellant.

Every fact necessary to confer jurisdiction on a court must affirmatively appear in its proceedings.

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Vickery v. Railroad, 93 Mo. App. 1. The showing made by plaintiffs did not entitle them to the *nunc pro tunc* entry of judgment. There is absolutely no evidence in this record showing that John G. Wear, the trial judge, ever rendered any judgment upon the verdict of the jury, and the finding of Judge Dearing that such judgment was in fact pending must rest upon presumption alone. If no judgment was rendered at the term, it can not be rendered *nunc pro tunc* simply for the reason that it ought to have been rendered at the term. Bohm Bros. & Co. v. Stivers, 75 Mo. App. 291. It is the settled law of this State that entries *nunc pro tunc* can only be made upon evidence furnished by the papers and files in the cause or something of record, or in the minute book or judge's docket. Young v. Young, 165 Mo. 630.

*J. W. Limbaugh* for respondents.

GOODE, J.—Action for damages for conversion of personal property. The case originated in Scott county and was sent on a change of venue to the circuit court of Stoddard county sitting at Dexter. In 1895 an act of the legislature was passed providing that two terms each year of the Stoddard circuit court should be held at Dexter and two terms at Bloomfield, the county seat. At the trial of this cause in the Dexter court, June 10, 1898, plaintiff obtained a verdict and defendant at once appealed. That appeal was dismissed February 27, 1900, because the record did not show a judgment had been rendered in the cause. An act of the legislature was passed and approved April 13, 1899, the effect of which was to abolish the terms of the court at Dexter and to leave only two terms of the Stoddard circuit court a year, namely, those held at Bloomfield. The act went into effect August 20, 1899, and hence was in force when the first appeal in the pres-

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ent case was dismissed by this court. After that dismissal, to-wit, March 8, 1901, the plaintiffs filed a motion in the circuit court of Stoddard county at Bloomfield, for an entry of judgment *nunc pro tunc*. That motion was taken up at the March term, 1903, and sustained; whereupon the defendant again appealed.

A review of the exceptions taken at the trial of the cause on its merits is claimed by the defendant, and though it is doubtful if the record warrants such a review, we have attended to the point made for a reversal on the merits, viz.: that the evidence was insufficient to support the verdict. Our opinion is against that position. The action was instituted by the plaintiffs Sperling and Schultz to recover the value of a mill which was levied on and sold as the personal property of August Uhde, under a judgment against Uhde obtained by H. W. Beers and others, before a justice of the peace. At the execution sale the defendant Stubblefield purchased the property but was notified by Sperling prior to the sale, that it belonged to him (Sperling) and Shultz. The facts are that in 1896 those parties had entered into a contract with Uhde by which the mill was leased to him for eighteen months for a certain rental, with the privilege of purchasing during the term for $800. Uhde did not purchase the mill, but after operating it a short time surrendered it to Sperling and Schultz, although he retained the custody of it as their agent. It is on the last fact that the defendant's counsel found a contention that the evidence did not justify the verdict. The argument is that there was no such visible change of ownership as would notify strangers and prevent a purchaser at the execution sale from being deceived into buying the property as Uhde's, the execution defendant. This argument is meritless in view of the fact, confessed by Stubblefield, that Sperling notified him whose property the mill was before he bought it.

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The instrument under which possession was originally turned over by the plaintiffs to Uhde was plainly a lease with an option to buy, and not a contract for a conditional sale of the mill. We make this statement because defendant asked our opinion as to the nature of said instrument; but as he was not an innocent purchaser without notice, the result would be the same in the other contingency.

It is argued that the circuit court of Stoddard county at Bloomfield obtained no jurisdiction of the cause for the reason that it was not pending in the Dexter circuit court when the act of 1899 took effect. That act provided that all causes pending in the circuit court at Dexter when it took effect, should be transferred to the circuit court at Bloomfield and be triable there. The position of the defendant's counsel is that when the act took effect the cause was pending in this court, as the dismissal of the appeal took place February 27, 1900, and the act became operative August 20, 1899. The plain purpose of the legislature was to confer on the Stoddard county circuit court sitting at Bloomfield, jurisdiction of all causes which the circuit court of that county, sitting both at Dexter and Bloomfield, had theretofore enjoyed. This cause was pending in Stoddard county when the act of 1899 became a law in such sense that the circuit court at Bloomfield acquired jurisdiction of it. There never was but one circuit court in Stoddard county, although for a while after 1895 it sat in two localities. Kinser v. Railroad, 69 Mo. App. 346. When the appeal was dismissed, the circuit court of Stoddard county had jurisdiction, and, as that court met at only one place, it had power to proceed further with the cause there. The interpretation of the law contended for by the defendant would put this action outside the jurisdiction of any court.

The serious contention on the present appeal is, that the entry of judgment by the circuit court on

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March 23, 1903, as and for June 10, 1898, was unwarranted by the proof introduced in support of the motion for the entry. The evidence on the motion consisted of the original petition, answer, replication, the record entries showing the impanelling of the jury, the trial, and the verdict for plaintiffs, the motion for new trial, the overruling of said motion, the motion in arrest of judgment and the overruling of that motion. Besides, there was some oral testimony which need not be recited. The defendant requested a declaration in the nature of a demurrer, that the plaintiffs, on the evidence, were not entitled to a *nunc pro tunc* judgment. The court refused that declaration of law, found a judgment had been actually rendered on the verdict of June 10, 1898, on the same day, but had not been entered of record; found, further, that the plaintiffs were entitled to have said judgment entered of record and ordered and adjudged that judgment be entered as of June 10, 1898, in favor of the plaintiffs for the sum of $432, to bear interest at the rate of six per cent annually after that date.

It should be borne in mind that the motion of the plaintiffs for judgment on the verdict, was not to have a judgment rendered by the Stoddard county circuit court which had never been rendered before; but was to have a judgment that had in fact been rendered June 10, 1898, but never recorded, entered of record as of that date. In other words, the motion was for a *nunc pro tunc* record entry in the strict sense of the words. The law in this State is that such an entry can not be made on oral testimony, but only on minutes, memoranda, or other written data appearing on the judge's or clerk's docket, the court records, or the files and papers in the cause. Priest Admr. v. McMaster Admx., 52 Mo. 60; Gamble v. Daugherty, 71 Mo. 599; Hansbrough v. Fudge, 80 Mo. 307; Atkinson v. Railroad, 81 Mo. 50; Ross v. Railroad, 141 Mo. 390; Blize v. Castlio, 8

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Mo. App. 290. The precise question is whether the documentary evidence introduced on the motion was sufficient to justify the court in ordering an entry *nunc pro tunc* of the judgment. That is to say, was there some documentary evidence from which the learned circuit judge might fairly infer that judgment had been previously rendered in the cause? If there was competent evidence from which to draw the inference, the finding of the circuit court is conclusive. Chapman v. Railroad, 146 Mo. 481. There was such evidence. The motion in arrest filed June 10, 1898, among other things, contains the following: "Comes now the defendant and moves the court to arrest the judgment herein for the reason: 1st. Upon the record said judgment is erroneous," etc. That recital of an existing judgment, with its verdict, well supported the finding that a judgment had been rendered; and as said motion was one of the papers in the cause, and the verdict part of the record, they were competent evidence to base a finding on. It is common practice in the circuit courts to order judgment on a verdict as soon as it is received, instead of waiting four days for motions for new trial and in arrest.

Precedents are not lacking in which *nunc pro tunc* judgments were upheld on less palpable and convincing documentary proof. Witten v. Robinson, 31 Mo. App. 525; Dawson v. Waldheim, 89 Mo. App. 545; Baldwin v. Lamar, Fed. Cases 800.

The case of Burnside v. Wand, 170 Mo. 531, is irrelevant, as that adjudication related to the rendition of a judgment in a cause at a term subsequent to the trial, entirely different from the judgment that actually had been rendered when the case was tried.

The judgment is affirmed. *Bland*, *P. J.*, and *Reyburn, J.*, concur.

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# STRODE, Admr. Estate of HARRIS, Appellant, v. BEALL, Respondent.

**St. Louis Court of Appeals, March 15, 1904.**

1. **ADVANCEMENT: Declarations of Testator.** Where a parent takes a promissory note payable to himself from his child, his declarations at the time of the transaction, or subsequent thereto, are admissible for the purpose of showing that the note was taken as a mere memorandum of an advancement.

2. ——: ——. A testator provided in a clause of his will that he made no charge for advancements unless a memorandum to that effect be found; he left notes signed by a son-in-law, payable to himself, which he had negotiated, giving the son-in-law the proceeds, and afterwards had taken up, and a memorandum was found among his papers, in which he stated that the notes should be charged to the maker's wife, testator's daughter, as an advancement. *Held*, the notes were receipts for advancements.

Appeal from St. Louis City Circuit Court.—*Hon. Franklin Ferriss*, Judge.

AFFIRMED.

*Rassieur & Rassieur* and *Arthur E. Kammerer* for appellant.

(1) Paragraph 14 of the testator's will, regarding advancements, can have no reference to the indebtedness of respondent on the notes in suit. (a) An advancement, in administration law, is a gift from a parent to a child, by anticipation of the whole or a part of what such child would inherit upon the death of the parent intestate. Bouvier's Law Dict.; 1 Am. & Eng. Ency. (2 Ed.), 760; 2 Woerner Admin. (2 Ed.), sec. 552; Thornton Gifts and Advancements, sec. 525-42. (b) The term advancement is understood to mean property

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given to a child by a parent or one *in loco parentis;* the term has no application to the relation of debtor and creditor. Est. of Williams, 62 Mo. App. 339, 347; Dawson v. Macknet, 42 N. J. Eq. 633; West v. Bolton, 23 Ga. 531. (c) Where a parent makes a loan to a child and takes a note for its repayment, with or without interest, it is prima facie a debt and not an advancement. High's App., 2 Pa. St. 283; Mann v. Mann, 12 Heisk. 245. (d) There is no presumption of of an advancement to the daughter where the father loans money to her husband and takes his note therefor; the obligation is his alone. Rains v. Hays, 6 Lea 303. (2) The memoranda, taken as signed declarations of the deceased, can not be construed as evidencing a gift to respondent or as a forgiveness of his liability on the notes in suit: (a) There was no consideration for the release. (b) There was no delivery to respondent. (c) It does not appear from the memoranda that it was the intention of the deceased to release respondent from his liability. Brunn v. Schuett, 59 Wis. 260; Justice v. Justice, 18 Atl. 674; Robson v. Jones, 3 Del. Ch. 51; Richardson v. Clow, 8 Ill. App. 91; Snowden v. Reid, 67 Md. 130; Gregg's Est., 11 N. Y. Misc. 153; Gray v. Barton, 55 N. Y. 68; In re Campbell's Est., 7 Pa. St. 100; Young v. Power, 41 Miss. 197; Chester v. Urwick, 23 Beav. 404.

*R. P. & C. B. Williams* for respondent.

(1) The payment of the husband's debts by his father-in-law held an advancement to the wife. Haylar v. McCombs, 66 N. C. 354; Peale v. Thurmond, 77 Va. 753; McDearman v. Hadnett, 83 Va. 284; Gaston's Admr. v. Robards, 9 Ky. 722. (2) A gift of personal property to the son-in-law is prima facie an advancement to the daughter. Bridges v. Hutchins, 11 Red. (N. C.) 68; Rains v. Hays, 6 Lea (Tenn.) 303. (3)

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The memoranda in question are admissions or declarations against interest of the deceased that the money advanced to the son-in-law, and represented by the notes, was intended as an advancement or gift to the daughter. Nelson v. Nelson, 90 Mo. 460; McDonald v. McDonald, 86 Mo. App. 122; Gunn v. Thurston, 130 Mo. 339. (4) Subsequent, as well as contemporaneous, memoranda and declarations are admissible to show advancement, when offered against the interest of the deceased. In re Murray's Est., 2 Chest. Co. Rep. (Pa.) 300. (5) It may be shown that notes were given simply as memoranda of advancements, or gifts, and not as evidence of a debt; and this may be shown by the declarations or admissions of the deceased. Peabody v. Peabody, 59 Ind. 556; Vaden v. Hance, 1 Head. (Tenn.) 300; Johnson v. Ghast, 11 Neb. 414; Brook v. Latimer, 44 Kan. 431. (6) Admissions against interest apply to memoranda and book entries as well as to oral and written statements. Gubernator v. Rettallack, 86 Mo. App. 184.

STATEMENT.

John T. Harris died testate at Harrisonburg, Virginia, October 15, 1899. Among his effects were found the following promissory notes:

"$130. Philadelphia, Pa., March 7, 1899.

"Four months after date I promise to pay to the order of John T. Harris, one hundred and thirty dollars, at First National Bank of Harrisonburg, Va., without defalcation for value received.

"JNO. M. BEALL.

"$330. Philadelphia, Pa., Jan. 7, 1899.

"Four months after date I promise to pay to the order of John T. Harris, three hundred and thirty dollars at the First National Bank of Harrisonburg, Va., without defalcation for value received.



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"No. ———. Due —————.

"Jno. M. Beall,

"828 Chestnut Street, Phil."

The maker of the notes is the husband of Jennie O. Harris, a daughter of John T. Harris, and resides in the city of St. Louis, Missouri.

The plaintiff, public administrator of the city of St. Louis, having in charge such of the estate of John T. Harris as was found in said city, brought suit against defendant on the above promissory notes before a justice of the peace from whose judgment the cause was appealed to the circuit court of the city of St. Louis, where on a trial *de novo* the issues were submitted to the court without the intervention of a jury. On the trial plaintiff offered in evidence the notes. The defendant offered in evidence the last will of John T. Harris which had been duly probated in the county court of Rockingham county, Virginia, November 21, 1899, also the following memoranda, admitted to have been written by John T. Harris in a memorandum book kept by him:

"March 22, 1899.

"I think it proper that I make the following statement:

"I have struggled to aid my children as their necessities occurred and as my ability enabled me to do.

"In their education as it was all directed by me, I take no account as to which spent the most money. I was satisfied none of them was extravagant and I often regretted my circumstances did not enable me to give them more spending money.

"I hold no charge against anyone on account of the cost of his or her education. I doubtless spent more on some than on others, but I do not know that I did, and if I did, it was my will and for the best and no one has a right to complain.

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"Since their majority I have been governed by the same principles. As to my daughters I have made them presents as I thought their wants most demanded and this without any charge against them. John Beall has been differently situated in this. He has lived in large cities where his expenses were heavy. I have aided him from time to time by indorsing notes in bank and advancing money. I have taken up two notes, one of $130, the other of $330 from the First National Bank of Harrisonburg. I am surety in two bonds or notes to John T. Harris, Jr., for Beall, one for $1,200 and one for $600. If I or my estate should have to pay these two notes, or any part thereof, I direct the principal shall be charged to Jennie O., as well as the principal of the two notes I have paid of $130 and $330, but not the interest. This money went to aid her and her family, and it is but just she should be charged with it. I regret it, but I think but just to the others, that I feel it my duty to charge her even with the principal.

"As to Graham I lent him some money, but he paid it back. I may have advanced him some small sums soon after he went to Chicago, which I did not expect him to return and I do not expect it now, if there were such.

"As to T., there have been many transactions between us, generally I was borrowing money from him to meet emergencies, which were pretty soon returned. I have not advanced him any money or lent him any, nor has he used any of my funds for his benefit and to-day there is not a cent between us.

"As to the other children, there are no charges against them as they have received nothing worth naming.

"If my boys should be able, I hope—if it ever becomes necessary—they will not let their sisters want for anything. March 22, 1899.

"JOHN T. HARRIS."

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"April 12, 1899.

"Upon mature thought I have determined not to charge Jennie O. with any more than the principal of the twelve hundred dollars bond which she signed with John Beall to John T. Harris, Jr., and which I also signed. Her case has been different in this from the others. She has been sick most of the time and she would not see at the time of distribution why she was charged with sums of which perhaps she knew nothing. She will have but little at best, and the sums with which I do not charge her would be but little when divided among the rest, but would be right smart to her and I am sure they will not grumble. I do for the best, as I understand it and feel.

"JOHN T. HARRIS."

Plaintiff objected to the introduction of the will and memoranda in evidence, on the ground that they constituted no defense to the plaintiff's cause of action, and on the further ground that the memoranda were not a part of the will and were not an exoneration or forgiveness of the debt, nor evidence that John T. Harris considered said indebtedness as an advancement. The objections were overruled, to which ruling plaintiff duly objected and excepted.

Defendant's evidence further shows that the estate of John T. Harris, at the time of his death, was valued at $60,000, and that the income from the estate was about $4,000 per annum. The will shows that the estate was left in trust for an indefinite period; that the testator had several daughters whose distributive shares, during the continuance of the trust and on final distribution, were devised to their sole and separate use.

The fourteenth clause of the will reads as follows:

"I make no charge for advancements unless a memorandum to this effect be found."

The notes in suit were discounted at the First Nat-

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ional Bank at Harrisonburg, Virginia, by John T. Harris, and the proceeds delivered to the defendant. John T. Harris, before the maturity of the notes, to-wit, on March 20, 1899, paid the bank and took up the notes and they were in his possession on the dates of the memoranda admitted in evidence.

No declarations of law were asked or given. The court found the issues for the defendant and rendered judgment accordingly, from which plaintiff, after taking proper steps to save his exceptions, appealed.

BLAND, P. J. (after stating the facts as above).—1. Where a parent takes a promissory note, payable to himself, from his child, his declarations at the time of the transaction, or subsequent thereto, are admissible for the purpose of showing that the note was taken as a mere receipt or memorandum of an advancement. Brook v. Latimer, 44 Kan. 431; Peabody v. Peabody, 59 Ind. 556; Nelson v. Nelson, 90 Mo. 460; McDearman v. Hodnett, 83 Va. 281.

In Kirby's Appeal, 109 Pa. St. 41, it is said: "Advancement is a question of intention, and the signing of a statement that a certain sum of money due the decedent was advanced by him, is sufficient evidence of such intention to convert the indebtedness into an advancement." In McDearman v. Hodnett, supra; Peale's Adm'r v. Thurmond, 77 Va. 753; Hagler v. McCombs, 66 N. C. 345, and Gaston's Adm'r v. Robards, 9 Ky. 722, it is held that the payment of the debts of the husband of the daughter of the deceased, or the advancement of money to him to assist him in his business, should, when the intention so to do was shown, be deemed advancements to the daughter. While the presumption is that the property given a child by a parent is to be accounted for on final distribution of the estate (Gunn v. Thurston, 130 Mo. 339), yet the transaction is one of intention and the presumption may be overcome

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by the contemporaneous declarations or subsequent admissions of the parent going to show that it was a gift, and such evidence is admissible on the ground that the declarations are against the interest of the declarant as they tend to diminish the value of the estate. McDonald v. McDonald, 86 Mo. App. 122; Nelson v. Nelson, 90 Mo. 460; Gunn v. Thurston, supra. Such admissions apply to memoranda and book entries made by the deceased. Gubernator v. Rattalack, 86 Mo. App. 184. The deceased indorsed and discounted the notes in suit for the accommodation of the defendant, his son-in-law. He took up these notes by paying the bank before their maturity. These facts, independent of the memoranda indicate that Harris did not expect the notes would be paid by the defendant, and a purpose on his part to treat the sums represented by the notes as an advancement to the wife of the defendant. The memorandum of March 22, 1899, considered in connection with the fourteenth clause of the will, removes all doubt of Harris' intention in respect to the notes and conclusively shows that when he took them up and entered the memorandum in his book, his intention was not to hold them as evidence of indebtedness of the defendant but as receipts for money he had advanced his daughter, defendant's wife. That this memorandum was admissible as evidence for the purpose of showing the intention of Harris in respect to the notes, we think, is abundantly sustained by the authorities, supra.

2. A discussion of the memorandum of April 12th, is not necessary to decision of this case, nor do we think it advisable to express any opinion in reference thereto as its effect upon the estate of John T. Harris and the distributive share of Jennie O. Beall thereof must be settled by the courts of Virginia.

The judgment is affirmed. *Reyburn* and *Goode, JJ.*, concur.

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# BREWER, Appellant, v. ST. LOUIS TRANSIT COMPANY, Respondent.

**St. Louis Court of Appeals, March 15, 1904.**

1. **PRACTICE: Instruction.** It is not error to refuse an instruction which correctly declares the law, where another instruction, practically the same, has been given.

2. **CARRIERS OF PASSENGERS: Contributory Negligence.** In an action by a passenger against a street railway company, for injuries caused while standing on the front platform of defendant's car, by the negligence of the motorman in letting the brake handle fly and strike plaintiff's arm, it was not error to refuse an instruction which authorized a recovery in spite of the fact that plaintiff may have been negligent in placing his arm within the radius of brake lever.

3. ———: ———: **Harmless Error.** Where the evidence tended to show the platform was crowded, it was error to give an instruction which ignored the motorman's duty of anticipating some one being within the radius of the brake, and breaking the force of the revolutions, but the error was harmless, where the plaintiff's evidence showed that he had ample room to keep out of the way of the brake, where he knew the signal to start had been given and that the brake handle would immediately begin to revolve.

Appeal from St. Louis City Circuit Court.—*Hon. Robt. M. Foster*, Judge.

AFFIRMED.

*D. D. Holmes* for plaintiff.

(1) The court erred in refusing instruction No. 7-P, asked by plaintiff. Said instruction informed the jury, in substance, that if plaintiff was riding as a passenger on the front platform of defendant's car, then the defendant owed plaintiff the duty of exercising every reasonably practicable precaution to protect

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plaintiff from the dangers incident to riding on said platform. This instruction correctly stated the law. Willmott v. Railway, 106 Mo. 542. (2) The court erred in refusing to give instruction No. 8-P, asked by plaintiff. Said instruction informed the jury that even if they found that plaintiff, while riding on the front platform of defendant's car, placed his arm within the radius of the brake handle, that such fact would not of itself necessarily constitute an act of negligence, but that the jury were to judge from all the facts and circumstances of the case, as shown to exist by the evidence, whether or not plaintiff was negligent. This instruction correctly stated the law. Gordon v. Buris, 153 Mo. 235. (3) The court erred in refusing to give instruction No. 9-P, asked by the plaintiff. This instruction stated, in effect, that even if plaintiff was negligent in placing his arm within the circle in which the brake lever moved, or was negligent in not knowing that when he placed his arm within this circle he was in a place of danger, yet, if the motorman could, by the exercise of the degree of care of a very prudent person, have discovered plaintiff in a place of danger before plaintiff was struck, and, by the exercise of such care, could have avoided striking plaintiff, then defendant is liable. This instruction correctly stated the law. O'Keefe v. Railway, 81 Mo. App. 386; Zumault v. Railroad, 71 Mo. App. 681. (4) The court erred in giving instruction No. 1-D, asked by the defendant. Said instruction told the jury, in substance, that it was not the duty of the motorman to anticipate that the plaintiff would put his arm within the radius of the brake handle; that it was the duty of the plaintiff to anticipate that the brake handle would swing around with violence; that it was the duty of the motorman to look ahead to see if the track was clear, and that if plaintiff put his hand within the radius of the brake handle after it became the motorman's duty to look ahead preparatory to starting the

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car, then plaintiff's injury was not caused by the negligence of the defendant. The error of this instruction is that there was no evidence on which to predicate it; that it does not state the law of the case correctly, and that it is confusing and misleading. Huelsenkamp v. Railway, 37 Mo. 553.

*George W. Easley* with *Boyle, Priest & Lehmann* for respondent.

(1) The seventh instruction asked by plaintiff was fully covered by instruction No. 2 given for plaintiff. (2) The eighth instruction was properly refused. It is negligent in one to place his arm within the radius of a brake handle, which it is a matter of common knowledge must revolve at every stop and start of the car. (3) The ninth instruction was properly refused. It omits all reference to the length of time that plaintiff's arm had been in a position of danger. It makes no allowance for the imperative duty of the motorman to keep a vigilant watch ahead when starting or running his car. Zumault v. Railroad, 71 Mo. App. 681. (4) It has never been the law that the contributory negligence of the plaintiff must be shown to be "the proximate cause of the injury." It has always been the rule that if the plaintiff's negligence "directly contributed" to the injury, that was sufficient to defeat his recovery. Moore v. Railway, 176 Mo. 528; Hornstein v. Railway, 97 Mo. App. 271. (5) If it be true that defendant's instructions 2 and 4 repealed the effect of mutual and concurring negligence, yet it seems well established that this court ought not to reverse for that reason. Hoepper v. So. Hotel Co., 142 Mo. 367.

## STATEMENT.

The suit is to recover damages for personal injuries alleged to have been caused by the negligence of defend-

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ant's motorman in charge of a street car upon which plaintiff was a passenger, riding on the front platform on account of the crowded condition of the car. The particular negligence charged is that "the mortorman in the employ of the defendant, and in charge of and operating said car, negligently, recklessly and carelessly caused the brake handle on the front end of said car to strike the plaintiff on his left arm, with great force and violence, thereby greatly and permanently injuring plaintiff on his said arm, and also causing serious and permanent injuries to plaintiff's nervous system."

The answer was a general denial and a plea of contributory negligence.

Plaintiff testified that he was on the front platform and that it was crowded with passengers; that after going eight or ten blocks the man to his right, standing in the corner of the platform got off and plaintiff was forced into the corner this other man had left. To brace himself he took hold of the screen of the car with his left hand and was looking toward his right over the screen; when the signal to go ahead was given he glanced forward and at that time noticed the right arm of the motorman fly up and at the same time the handle of the brake struck him on the left arm just above the elbow joint. Witness had been standing in that position before being struck for about twenty or thirty seconds —while passengers were getting on or off the car.

*H. R. Whipple*, a witness for the plaintiff, testified that he had formerly been a motorman. For five years and a half he had operated a brake like the one described in defendant's answer. Witness testified that with a crowded car such as had been described, the brake wound up, the car stopped, that it would be customary to let the brake off easily and to hang on to the brake handle. Witness said one could give the brake handle

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a jerk and throw up your hand and let it unwind itself; that by hanging on to the brake handle it would not be possible to injure anyone. Witness said that when he was a motorman he had often been so crowded that he had to push people away from the brake handle before letting it off.

For the defendant, the motorman in charge of the car testified that just as the signal to start was given, the plaintiff stepped forward between the brake and the screen and looked around to see if the passengers were getting on, and as he stepped forward the brake handle caught him on the arm. Witness let the brake handle loose one turn and then let it fly, that when he let it loose there was no one in the way, each man was standing back. Plaintiff had his right hand on the screen and his left hand in his coat pocket. Witness stated that with a man standing behind the brake with his back to the car, the brake would have a distance of two or three feet in which to revolve without touching anyone. Witness had seen two or three persons at once in this corner without being struck. He was not crowded that morning.

*M. T. Clark,* a passenger on the platform, testified that he was a passenger on the front platform of the car in question. He was standing next to plaintiff on his left. When the car stopped he noticed plaintiff looking out as if to see the cause of the delay, and while looking out the signal to go was given and the car went on and plaintiff turned around and came in contact with the brake handle. Witness did not notice plaintiff particlarly. He was next to plaintiff and as plaintiff turned around the only thing witness knew was that plaintiff was holding his arm and had been struck with the brake. Witness thinks the brake lever was in motion when plaintiff turned around.

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*Robert Phillips* testified that there were only three persons on the platform at the time plaintiff was injured.

A blue print plat of the platform was exhibited in evidence. It showed the platform to be six feet, six inches long across the front end of the car. It showed the front of the platform curved, the width in the center forty-seven and three-fourths inches and at the edges on each side thirty-seven inches. The brake staff was shown to be set in the platform from the right hand edge a distance of nineteen inches, and from the dashboard, or front edge of the platform, a distance of twelve inches. The brake handle on the end of the brake staff was shown by the plat to be fourteen inches long, describing a circle of twenty-eight inches. The position of the controller box, back of which the motorman stands, was indicated to the left of the brake staff. The plat was drawn on a scale of one and one-half inches to the foot.

Plaintiff asked the witness who made the measurements and the plat of the platform, to make a drawing of the exact size of the platform on the floor in front of the jury. On an objection made by defendant the court stated: "The question is whether or not the jury can get a fair idea of the size and measure of the platform. They have the blue print, and if they want any other measurement put on them you can ascertain what they are. Of course you can ask him anything about the blue print you see fit." And refused the request of the plaintiff, to which he objected and excepted at the time.

The court gave the following instructions for plaintiff:

"1. If the jury believe and find from the evidence the following facts, to-wit, that on or about the second day of January, 1903, plaintiff was a passenger on one of the defendant's east bound Spring avenue cars; that the plaintiff, in the exercise of ordinary care, was rid-.

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ing on the front platform of said car and that when said car reached the intersection of Twentieth street and Biddle street, in the city of St. Louis, the motorman in the employ of the defendant and operating said car, negligently caused the brake handle on the front end of said car to strike plaintiff on his left arm with great force and violence, thereby causing the injuries to plaintiff complained of, then your verdict should be for the plaintiff, provided the plaintiff himself was, at the time, exercising that care which an ordinarily prudent person would have exercised to avoid being injured.

"2. The court instructs the jury that if they believe and find from the evidence that the plaintiff was a passenger on defendant's car as alleged in the petition, then in that event the defendant owed to the plaintiff, while plaintiff was a passenger on said car, the duty of managing and operating its said car, with the highest degree of care of a very prudent person in view of all the facts and circumstances at the time of the alleged injury, and the defendant is liable to the plaintiff for any omission of such care, if such omission resulted in injury to the plaintiff, and if the plaintiff was at the time of the injury acting with ordinary care to avoid being injured, and if from the evidence in this case the jury believe that the plaintiff, while a passenger on the defendant's car, received an injury resulting from the negligence of the defendant, or its servant, as set forth in instruction No. 1, then your verdict should be for the plaintiff.

"3. The court instructs the jury that with respect to the charge of contributory negligence on the part of the plaintiff, the burden of proof is on the defendant, and unless the defendant proves to their satisfaction by a preponderance of the evidence that plaintiff was negligent and that such negligence and not the negligence of the defendant was the proximate cause of the injury,

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they should not find him guilty of contributory negligence."

And gave the following for defendant:

"1. It was not the duty of defendant's motorman to anticipate that plaintiff would put his arm within the radius of the brake handle. On the other hand, it was the duty of the plaintiff to anticipate that the brake handle would swing aroung with violence, when the car was started. It was the duty of the motorman just before starting the car to look ahead to see if the track was clear. If you find from the evidence that plaintiff put his arm within the radius of the brake handle after it became the duty of the motorman to look ahead preparatory to starting the car, then plaintiff's injury was not caused by the negligence of defendant and plaintiff can not recover.

"2. Even if you should find from the evidence that the defendant's servant was negligent in the manner specified, still plaintiff can not recover if he was negligent, and such negligence contributed to his own injury. There is a difference between a plaintiff's and a defendant's negligence in relation to an injury. It is this: Defendant's negligence, if any, must be the sole proximate cause of the injury, whereas plaintiff's negligence, if any, need not be the proximate cause of the injury, for it defeats a recovery if it but contributes directly, in any manner, to the injury. If plaintiff and defendant both were negligent and such negligence concurred in producing the injuries complained of, then plaintiff has no case and your verdict shall be for defendant.

"3. The court instructs the jury that if the plaintiff knew, or by the use of ordinary care might have known, that the car was about to be set in motion, then he must also have known that the brake handle had to revolve in its circle, and if he then placed his arm within

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its circle, he is not entitled to recover and your verdict shall be for the defendant.

"4. The court instructs the jury that if you believe from the evidence that the injury complained of was caused by the mutual and concurring negligence of the plaintiff and the defendant's motorman, and the injury would not have been caused if the negligence of the one had not concurred with the negligence of the other, then the plaintiff can not recover and your verdict shall be for the defendant."

The court gave proper instructions defining proximate cause, burden of proof and ordinary care.

The verdict and judgment were for the defendant. Plaintiff appealed.

BLAND, P. J. (after stating the facts as above).—1. Refused instruction No. 7, asked by plaintiff, and instruction No. 1, given for him, are practically the same and for this reason instruction No. 7 was properly refused.

2. Refused instruction No. 8 is not the law as it would authorize a recovery by plaintiff in spite of the fact that he may have been negligent in placing his arm within the radius of the brake lever.

3. Plaintiff's refused instruction No. 9 sought to apply the last fair chance doctrine to the facts of the case. It is possible the instruction should have been given; but if its refusal was error, the error was nonprejudicial as will appear further on.

4. Complaint is made of instruction No. 1 given for defendant. We think the instruction is open to criticism. It ignores the duty of the motorman to pay attention and have some regard for the safety of passengers on his platform. If, as the evidence of the plaintiff tends to show, the platform was in a crowded condition, then the motorman should have anticipated the probability of someone being within the radius of the brake

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handle and should have broken the force of its revolutions, as the evidence tends to show he could have done. But the plaintiff's own evidence shows that he was in the right-hand corner of the platform. The measurements of the platform show that he had ample room to keep out of the way of the brake handle. He knew the handle was there, knew a signal had been given for the car to start and knew the brake handle would immediately begin to revolve, yet he placed his arm within its radius. It was his duty under the circumstances to have kept out of the way of the brake handle, which the evidence clearly shows he could have done had he exercised any care whatever for his own safety. He is in the situation of having negligently placed his arm in a place of known danger and for this reason is not entitled to recover, and any instructions for defendant, however erroneous, will not warrant a reversal of the judgment. Moore v. Railway, 176 Mo. 528.

The judgment is affirmed. *Reyburn* and *Goode, JJ.*, concur, the latter on the ground that the instructions fairly presented the issues.

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## STODDARD, Appellant, v. ST. LOUIS & MERAMEC RIVER RAILROAD COMPANY, Respondent.

**St. Louis Court of Appeals, March 15, 1904.**

1. **CARRIERS OF PASSENGERS: Duty to Passengers Boarding Car.** A street railway company, in receiving passengers into its cars, is bound to give them reasonable time to reach places of safety therein.

2. ——: ——: **Time to Board Car in Safety.** And, in an action for injuries received while boarding defendant's motor car, where the evidence showed that plaintiff, after getting on the rear platform, was thrown and hurt by the sudden lurching of

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**the car in starting before she could get further, she made out a prima facie case of negligence on the part of defendant, which proximately caused her injuries.**

3. **———: ———: Signal to Stop. After the defendant's car stopped to receive passengers, it was its duty to allow plaintiff to get safely aboard, notwithstanding plaintiff did not signal the car to stop, in the absence of evidence of contributory negligence on the part of plaintiff.**

Appeal from St. Louis City Circuit Court.—*Hon. Franklin Ferriss,* Judge.

REVERSED AND REMANDED (*with directions*).

*Christian F. Schneider* and *Stephen Cornelius* for appellant.

(1) The implied contract which a common carrier owes to a passenger is to carry him safely and if the passenger be injured by the carrier, while the relation of carrier and passenger exists the burden is upon the carrier to show that the injury was not occasioned by its negligence. Sweeney v. Railway, 150 Mo. 397; Och v. Railroad, 130 Mo. 51; Dougherty v. Railroad, 81 Mo. 328. (2) It is the duty of a common carrier after it has received a passenger, to so manage its cars as to give him a reasonable opportunity to get to a place of safety therein. Coudy v. Railroad, 85 Mo. 79; Barth v. Railroad, 142 Mo. 542, 42 L. R. A. 293; Madden v. Railway, 50 Mo. App. 676; Smiley v. Railway, 160 Mo. 629.

*McKeighan & Watts* and *Wm. R. Gentry* for respondent.

If the plaintiff, on such meager testimony, was entitled to go to the jury, then anyone who carelessly stands on the platform or walks in the aisle of a moving car without using any precaution to prevent being



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thrown by the natural motion of the car, and is injured thereby, can bring a suit and recover when there has been no negligence whatever on the part of the defendant. No negligence having been shown, the peremptory instruction should have been given. Pryor v. Railway, 85 Mo. App. 367; Portuchek v. Railway, 74 S. W. 368; Saxton v. Railway, 98 Mo. App. 494; Bartley v. Railway, 148 Mo. 124.

BLAND, P. J.—Plaintiff, while a passenger thereon, was injured by falling upon the rear platform of one of defendant's street railway cars. The suit was to recover damages for injuries to her person caused by the fall. She recovered a verdict in the court below which, on motion of defendant, was set aside and a new trial granted. From the order granting the new trial plaintiff appealed. The ground assigned by the trial judge for setting aside the verdict is that the court erred in refusing defendant's instruction, offered at the close of plaintiff's evidence, to the effect that on her own showing she was not entitled to recover.

The negligence alleged in the petition is that after defendant stopped its car to receive passengers the plaintiff proceeded to board the car as a passenger, "but before she was able or had time to safely and fully board said car and while she was still upon the rear platform thereof and in the act of entering said car, the said car suddenly jerked and lurched forward thereby throwing the plaintiff violently and with great force against the rear end and floor of the platform of said car, causing her to be seriously hurt and injured in and about her back, spine, limbs and body; that said injuries were caused by the defendant's agents, employees and servants carelessly and negligently causing and permitting said car suddenly and in the manner aforesaid to start, jerk and lurch forward before plaintiff had safely and

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fully entered said car and before she had reasonable time to safely and fully enter said car."

Plaintiff located herself on Old Manchester Road, in the city of St. Louis, and testified:

"I walked into Arthur avenue and Old Manchester Road. As I got that far, that was two blocks from Sutton avenue, and then I just got in time. There was a car coming and I went across the road. Others were there waiting for the car and the car stopped, and they got on the car ahead of me, and then I got on the car, and as I got on the first step the car started up, and as I got on the rear platform it gave a jerk and threw me back against the rear end of the car.

"Q. Just as you were in the act of getting in the car? A. Just as I was facing —

"Q. (Interrupting.) What happened then—when it jerked back what did it do? A. I fell to the floor and I got hurt and there was a couple of men I believe. I know they carried me in the car."

On cross-examination, her evidence in respect to the fall is as follows:

"Q. You fell after you got upon the platform? A. Yes, sir.

"Q. Just as you were going in the door? A. Yes, sir, as I got upon the platform.

"Q. So the starting of the car didn't make you fall. It was this jerk afterwards? A. The jerk of the car throwed me.

"Q. I say it was not the starting of the car when you were on the step that made you fall. It was the jerk after you got upon the platform? A. It was the jerk.

"Q. After you got on the platform? A. Yes, sir, after I got on the platform. I was upon the platform.

"Q. So you got on the first step and then got on the platform, and you walked to the door, and before

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you entered the door you fell, is that right? A. I didn't get in the car at all.

"Q. No; I didn't say you did. If you will listen carefully there will be no mistake about this. You got on the first step and then on the platform? A. Yes, sir.

"Q. Then you walked to the door? A. Well, I just turned around to attempt to go in the door, and the car gave a sudden jerk and throwed me down.

"Q. What sort of a jerk was that, madam? A. Well, I can't explain it. It was the jerk that throwed me.

"Q. Was it the movement that ordinarily takes place when a car starts? A. Oh, it was a sudden jerk. It was more than that.

"Q. You have stood in cars, have you not, when they were moving and stopping and everything? A. Yes, sir, I have.

"Q. You have noticed the necessity when cars are starting and stopping of holding on to a strap or holding on the edge of the seat, have you not? A. Yes, sir.

"Q. Whenever a car starts it is apt to give some sort of jerk, is it not? A. Well, I don't know. Sometimes it is. I have noticed it a good many times when I have been out on them.

"Q. I mean generally when the cars start, if you are standing up, it is necessary to hold onto something or somebody to keep from upsetting or losing your balance? A. It ain't all the time.

"Q. I didn't say all the time, I said generally? A. Well.

"Q. Is not that so? A. It may be, I couldn't give you a decided answer about that.

"Q. Was not that movement which you say caused you to fall just such a movement as generally takes

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place when a car starts? A. It was more of a jerk than that or it would not have thrown me back.

"Q. Can't you tell us what sort of jerk it was? A. It was jerk enough to throw me back.

"Q. Three or four men got in ahead of you? A. I believe they did. Some men got in.

"Q. Did it throw any of them down? A. I don't know.

"Q. If they had fallen, would you have seen it? A. I don't know. I was not looking after them any.

"Q. You didn't see anybody else fall? A. I didn't see anybody else fall.

"Q. Are you perfectly sure that you didn't step on your skirt and trip there? A. No, sir, I didn't step on my skirt.

"Q. You are sure of that, are you? A. Yes, sir, I am sure of that.

"Q. Now, when you fell, did you fall down on the platform in a heap or did you fall against the rear dash-board of the car? A. No, I fell back against the dash-board. I got a jerk enough to throw me back against the dash-board. Then I fell on the floor.

. . . . . .

"Q. Did you see anybody hail the car? A. There was a man hailed it.

"Q. Were you there before he hailed the car? A. Yes, sir, I was there.

"Q. Where were you standing with reference to the man? A. Back of the man. That's why I expect he got on before I did. Two or three or maybe four.

"Q. Did they get on ahead of you? A. Yes, sir, they did.

"Q. You were the last to get on? A. Yes, sir, I believe I was. I didn't see anybody get on after me.

"Q. Now, did you have hold of anything with either of your hands at the time you were jerked back?

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A. Well, not at that time. When I first started to get on the car I caught hold of that bar to get on the car. The car started when I was on the first step. Then when I got on the platform I aimed to get hold of something but I got jerked. That threw me back.

"Q. Were you reaching forward at the time you got jerked back? A. I believe I was for I had turned around to go in the car."

*William Vaughn*, a witness for plaintiff, testified as follows:

"A. I was not looking out of the window, that is, the window was closed. I was merely with my head turned. The conductor was up about the center part of the car. I am not positive whether he was collecting fares or not. Anyway he gave a signal, and as he gave the signal I saw that she was not quite on or hadn't got a footing. I turned around this way then to look out the door. I could see she fell down because I couldn't see her above the window line there in the back. A gentleman rushed from—I guess he sat about five or six seats from the back on the north side. He rushed out there, and him and another gentleman brought the lady in and sat her right in the next seat right in front of me.

"Q. What was the movement of the car at that time? A. Well it was just like ordinarily when they give a signal the car will kind of lurch a little that way enough of course if a person is not holding he will be thrown, even standing in the car holding.

"Q. This car lurched, did it? A. Yes, sir.

"Q. Did you feel that lurch? A. About like that (indicating). Of course sitting in a chair that way and looking around I could feel it too.

"Q. You felt it? A. Yes, I could feel the lurch a little."

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On cross-examination he testified as follows:

"Q. Well just one or two questions. This lady, Mrs. Stoddard, says that she had got upon the platform and got to the door of the car when she fell. Now you don't know just where she was when she fell? A. I know she hadn't got to the door.

"Q. What? A. She hadn't got to the door. She might have been to the edge.

"Q. Well she says she was right near the door when she felt this lurch. A. I expect she was about there.

"Q. Did you feel any lurch of the car other than the motion that the car made when it started? A. Oh, no, as it starts up it will give a lurch like.

"Q. Did you feel any jerk after that? A. No, sir.

"Q. You are sure of that? A. Oh, well, yes, sir.

"Q. Now the plaintiff states that the car started when she was on the first step, is that your idea? A. I think she must have been upon the platform because I couldn't see her when I was looking backward. If she had been upon the step I would have been more apt to see her.

"Q. You felt no jerk at all except the one movement when the car started up? A. That's all.

"Q. That's the sort of movement that you ordinarily feel when a car starts up? A. Yes, sir.

"Q. And you didn't notice that any more than you notice any other movement when a car starts? A. No, I don't know that I did."

This was all the evidence offered by plaintiff relevant to the cause of the injury.

The evidence offered by the defendant did not strengthen plaintiff's case. As is shown by her evidence, the plaintiff is forty-nine years old and the mother of several grown children, and is a plain, truthful, working woman. Her evidence shows that the car

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started before she had reached the platform, but it does not appear that she was disturbed in her movements by the starting of the car, and she reached the platform in safety and had her face towards the door of the car with a view of entering it when, by a lurch of the car, she was thrown backward upon the platform just at the moment she let go her hold on a handle bar and was reaching forward to get hold of something else to enable her to enter the door of the car. Her evidence shows that the lurch of the car which threw her was more than an ordinary lurch occasioned by the starting of an electric car, although the evidence of plaintiff's witness, Vaughn, was that there was no unusual lurch in the motion of the car. He further testified—and it is common experience—that the ordinary jerk or lurch made by starting an electric car is sufficient to throw an ordinary person standing in the car or on the platform without support, and we think the plaintiff is probably mistaken in her belief that the lurch which caused her to fall was greater than the ordinary lurch made by the starting of a car, and hence if she was entitled to go to the jury, it must have been upon the ground that the car was started before she had time sufficient to reach a place of safety aboard the car. Barth v. Railway, 142 Mo. 535, was an action against an elevated railway company operated by electric power. The deceased was thrown and killed by the starting of the car when he was on the steps. The court, at page 550, said: "A common carrier of passengers is bound to allow its passengers reasonable time to enter and leave its cars, and while it may start before a passenger has been seated, it must exercise the highest degree of care that prudent and cautious persons would use and exercise under similiar or the same circumstances, in starting its cars so as not to suddenly jerk or jar him and thereby injure him. Dougherty v. Railroad, 97 Mo. 647; Smith v. Railroad, 108 Mo. 243; Jackson v.

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Railroad, 118 Mo. 199; Gilson v. Railroad, 76 Mo. 282; Furnish v. Railroad, 102 Mo. 438; Jacquin v. Cable Road, 57 Mo. App. 320."

In Dougherty v. Railroad, 81 Mo. 325; s. c., 9 Mo. App. 478, the evidence showed that the plaintiff had boarded defendant's car on Olive street, in the city of St. Louis, and moved rapidly forward about half way the length of the car and was just in the act of turning around to take a seat when the car started forward with a violent jerk, upsetting him. He grabbed for a strap but failed to reach it; to save himself he placed his left hand against the window but his fall was so violent that his hand crashed through the window and was lacerated. He was nonsuited at the trial. The judgment of nonsuit was reversed by this court and again by the Supreme Court. The latter court, at page 330, in respect to the obligation of the carrier said: "With respect to the obligation of the defendant to the plaintiff as a passenger, it is sufficient to say, that while it is not an insurer of the safety of passengers, it is bound by its office, as such carrier, to exercise due care and vigilance, so as to safely transport them. It must allow reasonable time for passengers to enter and leave its cars with safety, in the exercise of ordinary care. It should allow the passengers reasonable time to enter and take a seat, if there be one, or reasonable time to seize straps furnished for passengers when standing; and while it may start its car before the passenger has had time to take a seat, or secure his hold on the strap, it must exercise the utmost care in starting so as not to jar or upset him."

In Akersloot v. Railroad, 15 L. R. A. (N. Y.) 489, it is said: "The conductor of a street car must see that a passenger entering the car is in a place of safety before he gives the signal to proceed, and the passenger is entitled to damages if he is thrown down and injured by the premature starting of the car." The same ruling was made in Central Railway Company v. Smith,

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74 Md. 212; Steeg v. Railway, 50 Minn. 149, and in West Chicago Street Railway Company v. Craig, 57 Ill. App. 411.

In Holmes v. Allegheny Traction Co., 153 Pa. St. 152, it was said: "In an action against a street railway company to recover damages for personal injuries, it is proper to submit the case to the jury where testimony on behalf of the plaintiff, an elderly woman, although contradicted, tended to show that she entered a street car from the front platform on the invitation of the driver, and, before she was able to take her seat, the car was started with a jerk and plaintiff was thrown and injured."

The evidence and common experience that the starting of a street railway car propelled by electricity is ordinarily attended by a jerk or lurch sufficient to throw an unsupported person standing in the car, it seems to us is sufficient vindication of the doctrine of the foregoing cases as applied to street railway cars operated by electric power, and conclusively shows that plaintiff made a prima facie case and that the court erred in setting aside the verdict on the ground assigned. Defendant, however, contends that the court erred in refusing the following instruction asked by it:

"The court instructs the jury that if you believe from the evidence that when the car in question approached the far crossing of Arthur avenue, the plaintiff was on the north side of Manchester avenue, and after the car stopped, the plaintiff crossed behind the car and boarded same, and if you further believe from the evidence that the plaintiff gave no signal to defendant's motorman that she desired to board said car, and if you further believe from the evidence that the plaintiff in so boarding said car without giving a signal was guilty of negligence, and that said negligence directly contributed to cause the injuries complained of by

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plaintiff, then and in that case your verdict must be for defendant."

Defendant contends that for this error the motion for new trial should have been sustained. The evidence of both plaintiff and defendant shows that the car stopped for the purpose of receiving passengers. It is immaterial who gave the signal for it to stop. After stopping for the purpose of receiving passengers, it was the duty of the conductor to hold the car a reasonable length of time to allow the passengers, including plaintiff, to board the car and to reach a place of safety thereon before giving the signal to start. There is no evidence tending to show that such reasonable time was allowed plaintiff and hence there is no evidence that she was guilty of contributory negligence. The instruction was properly refused. The instructions given are in harmony with the views herein expressed and under the evidence the verdict is for the right party.

The judgment is reversed and the cause remanded with directions to the trial court to set aside the order granting a new trial, overrule the motion therefor and enter judgment for plaintiff on the verdict of the jury, with interest thereon at six per cent per annum from the date of the rendition of said verdict. *Reyburn* and *Goode, JJ.*, concur.

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## ELLIOTT, Respondent, v. CHICAGO & ALTON RAILWAY COMPANY, Appellant.

**St. Louis Court of Appeals, March 29, 1904.**

1. **RAILROAD CROSSING: Statutory Duty.** A traveler approaching a railroad crossing has a right to rely upon the railway company's performance of its statutory duty to sound the whistle or ring the bell, thus warning him of the approach of an engine.
2. **———: Duty of Traveler to Look and Listen.** And a traveler driving a wagon, when thus approaching a railroad track, where the view is obstructed, if he is in a position to hear the

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bell or whistle, is not required to exercise the extraordinary precaution of stopping, tying his team and going forward on foot to a point where he can see if a train is approaching.

3. ——: ——. The evidence in this case examined at length and held that the plaintiff, who sues for damages caused at a crossing of a railroad track, by a collision with an engine, was not, as a matter of law, guilty of contributory negligence in not stopping before attempting to drive across and going forward on foot to see if a train or engine was approaching.

Appeal from Audrain Circuit Court.—*Hon. E. M. Hughes*, Judge.

AFFIRMED.

*Scarritt, Griffith & Jones* for appellant.

(1) Whether or not plaintiff's conduct, as shown by his admissions, the testimony of his own witnesses and the undisputed physical facts, was negligence is a question of law for the court. Turner v. Railroad, 74 Mo. 607; Davies v. Railroad, 159 Mo. 7; Henze v. Railroad, 71 Mo. 640; Buesching v. Gaslight Co., 73 Mo. 229. (2) Plaintiff proved conclusively that if he had stopped and listened he could have heard the engine approaching. Hook v. Railroad, 162 Mo. 569. (3) It is held that one has not "looked" so as to free himself from the charge of contributory negligence, who drives upon a railroad crossing where the view is at the time obscured by a cloud of dust, or smoke from a train just passed, or from a nearby factory. He should wait until his sense of sight could be effectively used. Benyon v. Railroad, 168 Pa. 642, 32 A. 84; McNamara v. Railroad, 64 Hun (N. Y.) 637; Foran v. Railroad, 147 N. Y. 718, 42 N. E. 722; Flemming v. Railroad, 49 Cal. 253. (4) The authorities are overwhelming to the effect that, under the circumstances, defendant's demurrer to the evidence should have been sustained. Stepp v. Railroad, 85 Mo. 235; Weller v. Railroad, 120 Mo. 649; Moberly v.

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Railroad, 17 Mo. App. 543; Damrill v. Railroad, 27 Mo. App. 205; Powell v. Railroad, 109 N. Y. 613, 15 N. E. 891; Schmolze v. Railroad, 83 Wis. 659, 53 N. W. 743; Ashworth v. Railroad, 97 Ga. 306, 23 S. E. 86; Railroad v. Crisman, 19 Col. 30, 34 Pac. 286; Chase v. Railroad, 78 Me. 346, 5 A. 771; Brady v. Railroad, 81 Mich. 616, 45 N. W. 1110; Jensen v. Railroad, 102 Mich. 176, 60 N. W. 57; Clark v. Railroad, 47 Minn. 380, 50 N. W. 365; Merkle v. Railroad, 49 N. J. Law 473, 9 A. 680; Seefeld v. Railroad, 70 Wis. 216, 35 N. W. 278; Pepper v. So. Pac. Co., 105 Cal. 389, 38 Pac. 974; Salter v. Railroad, 75 N. Y. 273; Hager v. Railroad, 98 Cal. 309, 33 Pac. 119. (5) Plaintiff's contention that he had a right to rely upon defendant's ringing the bell or blowing the whistle is not well taken. It is only where a person is doing his full duty that he can safely rely on another's doing his duty. Clark v. Railroad, 127 Mo. 197. (6) The opinion heretofore rendered in this cause is in conflict with numerous decisions of our Supreme Court.

*P. H. Cullen* and *R. D. Rogers* for respondent.

(1) The only point defendant insists upon in his brief is that plaintiff was guilty of contributory negligence as a matter of law, and hence all other points are waived. Kansas City v. Walsh, 88 Mo. App. 276; In re Estate Cogswell, 93 Mo. App. 491; Corrigan v. Kansas City, 93 App. 173. (2) One approaching a railroad crossing has a right to presume that the railroad will obey the law in notifying him of the approach of its train by ringing its bell or sounding whistle when within 80 rods of the crossing. Labor v. Railroad, 46 Mo. 353; Crumpley v. Railroad, 111 Mo. 152; Kenney v. Railroad, 105 Mo. 286; O'Connor v. Railroad, 94 Mo. 150; Petty v. Railroad, 88 Mo. 306; Weller v. Railroad, 164 Mo. 180. (3) A traveler is not guilty of con-

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tributory negligence as a matter of law because he fails to stop in approaching a crossing where his view is obstructed, nor is the traveler required to leave his horse and go in advance to the track and look up and down for approaching trains, and his failure to get out and make advance observations is no evidence of negligence. Huckshold v. Railroad, 90 Mo. 548; Kelly v. Railroad, 88 Mo. 534; Alexander v. Railroad, 112 N. C. 720; Hook v. Railroad, 162 Mo. 602. The general rule requires a traveler to look where he can see, listen where he can not see and to stop only when the circumstances are such that he can not listen without stopping. And whether he ought to stop is a question for the jury depending upon the circumstances of each particular case. Russell v. Receivers, 70 Mo. App. 95; Mayes v. Railroad, 71 Mo. App. 142. (4) A traveler will not be chargeable with contributory negligence for failing to stop and listen if the approaching train could not have been seen had he stopped, nor heard, because it made so little noise, had he listened. Baker v. Railroad, 122 Mo. 544; Donohue v. Railway, 91 Mo. 363; Dahlstrom v. Railway, 108 Mo. 525; Hinze v. Railroad, 71 Mo. 636; Masterson v. Railway, 58 Mo. App. 574; Huckshold v. Railway, 90 Mo. 556; Johnson v. Railroad, 77 Mo. 546; Winstantz v. Railroad, 72 Wis. 375; s. c., 39 N. W. 856; Davis v. Railway, 47 N. Y. 400; McGuire v. Railway, 2 Daly (N. Y.) 76; Hinkle v. Railway, 109 N. C. 472; s. c., 26 Am. St. 581; Railroad v. Lee, 87 Ill. 454.

BLAND, P. J.—Main street in the town of Farber, Audrain county, Missouri, runs north and south. The tracks of the defendant railroad company run east and west through said town and cross Main street at right angles. South of the track at the crossing of Main street, and eight and one-half feet from the main track, is a side track. A sixteen foot crossing constructed of planks was laid over these tracks to form a crossing on

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Main street. On the morning of November 11, 1902, plaintiff, a farmer living north of Farber, brought a two-horse wagon load of corn into town, drove along Main street, crossed over the tracks and unloaded his corn in a crib a short distance south of the tracks. He then started back to his home, driving north on Main street; when he reached the crossing, an engine and tender backing west on the main track collided with his team, killed his two horses, smashed his wagon, and threw him to the ground, doing him some injury, not, however, of a permanent character. The suit was to recover the damages caused by the collision. The negligence of the defendant, upon which plaintiff predicated his right to recover, was that defendant negligently ran its engine at a rapid rate of speed over the crossing, failed to keep a lookout for persons on the crossing, and failed to sound the locomotive whistle as it approached the crossing, or to ring the bell and keep the same ringing until the crossing was passed, and negligently failed to give any signal or warning whatever of the approach of the engine.

The answer was a general denial and a plea of contributory negligence.

The trial resulted in a verdict and judgment in plaintiff's favor for fifteen hundred dollars. Defendant appealed.

At the close of plaintiff's evidence and again at the close of all the evidence, defendant asked peremptory instructions to be given to the jury to find for it. The court refused to give these instructions. The ruling of the court on these instructions is the only error relied upon by defendant for a reversal of the judgment.

The contention is that plaintiff's own admissions as a witness, as well as the whole evidence, show that plaintiff, as a matter of law, was guilty of negligence that directly contributed to his injury and for this reason he can not recover. It is conceded that plaintiff's view to

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the east, as well as to the west, as he approached the crossing on Main street was obstructed by cars standing on the side track and by an elevator standing east of him near the track, and that he could not have seen the engine for at least a half a mile by looking toward the east, without first placing himself north of the side track, on account of these obstructions. It is also shown that cars standing on the side track were so near the crossing on Main street that a space of not more than twelve or fourteen feet was open at the crossing for the passage of teams. The plaintiff's own evidence shows that, without stopping, he drove upon the crossing, that when he cleared the side track, and when his horses were on the main track, he could then look east down the track and did look and saw the engine was upon him. He testified that before driving upon the track he listened for a train but heard none; that he heard no whistle blowing or bell sounding; that when he drove into town he saw an engine at the depot (west of the crossing) and while he was unloading his load of corn at the crib he heard a train going by and thought the train had pulled out and gone on east. He further testified that by stopping his team before going on the crossing, and getting out and walking past the side track he could have seen down the track to the east for a mile or more. It is shown that the grade of the track to the west was slightly descending and that the engine, at the time of the collision, was running without exhausting steam and was making scarcely any noise. There was a corn sheller in operation near by, on the south side of the track, that was making considerable noise. For the plaintiff, a number of witnesses in a position to hear, testified that they did not hear the engine whistle and that the bell was not rung until after the engine struck plaintiff's wagon, and that the speed of the engine was from twenty to thirty miles per hour. For defendant the evidence is that the whistle was blown three times,

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eighty rods west of the crossing; that the bell had an automatic ringer and that it was put in operation and the bell sounded continuously until the crossing was passed, and that the engine was moving at a speed of from fifteen to twenty miles per hour.

It is conceded that when the wagon came into view of the engineer, the engine was so close to the wagon that it was impossible to stop it in time to avoid the collision. The evidence on the part of plaintiff tends to show that defendant's engineer was guilty of negligence in failing to sound the whistle or ring the bell of the engine in the manner required by statute (sec. 1102, R. S. 1899) as he approached the crossing. On account of this negligence, plaintiff was entitled to have his case submitted to the jury, unless his admissions, or the whole of the evidence, show that he was, as a matter of law, guilty of negligence directly contributing to his injury.

It is insisted that the evidence of Tribue, White, Shotwell and Machem, witnesses for plaintiff, taken in connection with the evidence of plaintiff, shows conclusively that if plaintiff had stopped and listened, he could have heard the engine and tender as they were backing towards the crossing and that he could have seen the engine as he was driving from the crib to the street, if he had looked at that time. To correctly estimate the value of the testimony of these witnesses, their surroundings and their viewpoints, from which they made their observations of the movements of the engine and tender, must be taken into consideration. Just east of the crossing is a cut ending at a cattle guard four hundred feet east of the crossing, and a quarter of a mile or more east of the cattle guard is a coal chute and pond; on the south bank of the pond were growing willows which obstructed the view and prevented a person standing at or near the crib or in Main street east of



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the crossing from seeing the engine at the coal chute. The engine backed westward from the coal chute. The crib where plaintiff delivered his corn was in a field forty-five feet east of Main street. The gate entering the field to go to the crib is eighty or ninety feet south of the crossing. Fifty feet east of the crossing, on the south side and within a few feet of the railroad track, is an elevator. Near this elevator was a corn sheller in operation which was driven by a traction engine. Tribue placed himself near the cornsheller. From this point of view, he testified that he heard the engine as it backed up; that the whistle was not sounded nor the bell rung until after the engine collided with the plaintiff's wagon; that he saw the engine at the coal chute and until it entered the cattle guard but that he could not see it after that on account of the elevator and cars standing on the track. White placed himself on the railroad right of way on the south side of the track near the depot and about four or five hundred feet west of the Main street crossing. He testified he saw plaintiff drive through the field gate into the street; that just as plaintiff reached the gate he was driving in a trot but slowed up as he came through the gate "to the next thing to a walk;" that plaintiff was holding his team, checking it up; that he looked west about the same time and saw the engine; that the engine was running over twenty miles an hour at the time it struck plaintiff, and no signals were given until after plaintiff was struck, then the bell was rung; that the engine was slipping along and did not seem to make any noise. Shotwell testified that he was running the threshing machine engine to operate the cornsheller; that he did not see the engine untill after it collided with plaintiff's team and wagon; that he then saw the engine and heard the bell ring for the first time. Machem testified that he was at the corn crib unloading corn from his wagon when plaintiff drove from the crib; that he saw the en-

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gine going west a short time after plaintiff had driven from the crib; that he could see the top of the engine as it came back and there was no motion of the bell; that it did not ring, the whistle was not sounded and the engine was not exhausting steam. The person in charge of the engine also testified that the engine was not exhausting steam; that it was gliding along without making scarcely any noise.

Several witnesses testified that as plaintiff's team trotted out of the field his wagon made considerable noise. The street was a dirt road, comparatively smooth, and the evidence is that the wagon made but little noise after it reached the street. All the evidence in respect to the cornsheller, is that it made considerable noise.

Tribue was fifty feet east of Main street and within a few feet of the railroad track. His position to see and hear the engine was, for this reason, greatly superior to plaintiff's and the court is not warranted to conclude, because Tribue heard the engine, that plaintiff would have heard it, if he had stopped and listened. A jury on its own responsibility might arrive at such an inference, but a court can not. White was on the south side of the railroad track where there was nothing to obstruct his view, and the fact that he saw the engine from where he stood does not show or tend to show that plaintiff might have heard it, nor does it show that plaintiff recklessly drove upon the track in a trot. Machem saw the engine while at the crib, but after plaintiff had driven away. From this scrap of evidence it is contended that plaintiff could have seen the engine before he got out of the field and that it was his duty to look from that point. It is not affirmatively shown that he could have seen it had he looked before driving out of the field. But suppose he could have done so. Must he be convicted of contributory negligence for failing to look for a train when he had not

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reached the road leading to the crossing and when he was a hundred feet or more from the crossing? Tribue said he saw the engine as it passed in front of him. If this be so, then the engine must have been within fifty or sixty feet of the crossing at the time he saw it, and hence Tribue's evidence does not show or tend to show that the engine came in view of anyone in the field at the time plaintiff was driving across it. The evidence of these witnesses may tend to prove that plaintiff, had he stopped and listened before driving on the track, might have heard the engine coming, but it falls far short of showing conclusively that he would have heard it and hence fails to convict him of contributory negligence as a matter of law.

As the evidence is all one way that plaintiff could not have seen the engine had he looked, on account of the obstructions, he can not be convicted of negligence for failing to look unless it was his duty, in the circumstances surrounding him, to have stopped his team, alighted from his wagon, and gone on foot to the crossing to a point where he could have looked to the east down the main track. It is clear if he had done this he would have seen the engine coming toward the crossing and would have avoided the injury by remaining south of the track until the engine had passed over the crossing. Was it his duty to take this extraordinary precaution before attempting to go over the crossing? If so, then plaintiff's peremptory instruction should have been given. The plaintiff had a right to rely upon the company's performance of its statutory duty to sound the whistle or ring the bell and thus to warn him of the approach of the engine. Donohue v. Railway, 91 Mo. 357; Weller v. Railway, 120 Mo. 635. And if he was in a position to have heard the whistle or bell, he was not required to exercise the extraordinary precaution to stop, tie his team, and go forward on foot to a point where he could look and see the engine coming. Kelly

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v. Railroad, 88 Mo. 534; Huckshold v. Railway, 90 Mo. 548.

The case of Holwerson v. Railway, 157 Mo. 216, cited and relied upon by defendant, is not in point, for the reason the facts are variant from those in the case at bar. The next Missouri case cited and relied on by defendant is Hook v. Railway, 162 Mo. 569. There were two opinions in that case; one by ROBINSON, J., concurred in by SHERWOOD and MARSHALL, JJ., that the judgment should be reversed; the other opinion by VALLIANT, J., concurred in by BRACE and GANTT, JJ., held that the judgment should be affirmed. BURGESS, J., voted to reverse the judgment and remand the cause. In order to dispose of the case, ROBINSON, SHERWOOD and MARSHALL, JJ., voted with BURGESS, J., that the judgment be reversed and the cause remanded for new trial. Nothing whatever was decided by a majority of the court, except that the judgment should be reversed and the cause remanded for new trial, and the case is not an authority on any of the controverted legal propositions discussed in either of the opposing opinions, and is not authority for the proposition that to clear his skirts of negligence as a matter of law, the plaintiff, in the circumstances detailed in this case, was required to get out of his wagon, tie his team and go on foot to the railroad crossing to see whether or not a train was approaching before attempting to cross the tracks. Circumstances might arise where ordinary prudence would require such a precaution to be taken by one before attempting to cross a railroad track on a public highway, but we do not think the evidence in this case conclusively shows that the plaintiff should have taken this extraordinary precaution, in the circumstances that surrounded him at the time, and the trial court was not authorized to say as a matter of law that it was plaintiff's duty to do so, but that it was a question of fact for the jury to pass on. We hold, therefore, that the

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trial court did not err in refusing defendant's peremptory instructions and affirm the judgment. *Reyburn* and *Goode, JJ.*, concur.

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SCHWEND, Respondent, v. ST. LOUIS TRANSIT COMPANY, Appellant.

**St. Louis Court of Appeals, March 29, 1904.**

**DAMAGES: Future Pain: Reasonable Certainty.** Future pain and anguish recoverable in an action for personal injuries must be limited to such as will be reasonably certain to occur, and an instruction to the jury which allows damages for such pain and anguish as plaintiff "may suffer in the future," is error, because ignoring the bounds of reasonable certainty.

Appeal from St. Louis City Circuit Court.—*Hon. Jas. R. Kinealy,* Judge.

Reversed and remanded.

*Boyle, Priest & Lehmann, George W. Easley* and *Glendy B. Arnold* for appellant.

(1) The instruction violates the rule that future damages for injuries, pain or suffering must be confined to such as the evidence renders it reasonably certain will result from the injury. It is only for such damages in the future as will certainly and necessarily be sustained that a recovery may be had. Curtis v. Railroad, 18 N. Y. 534, 75 Am. Dec. 258; Bigelow v. Railway, 48 Mo. App. 374. (2) The proper way to draft an instruction of this character seems to be well settled by judicial precedents in this State. The jury should be instructed to find compensation "for all such damages which it appears from the evidence will reasonably result from her injuries in the future." Ross

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v. Kansas City, 48 Mo. App. 446; Russell v. Columbia, 74 Mo. 480; Chilton v. St. Joseph, 143 Mo. 199; White v. Railway, 61 Wis. 536, 50 Am. Rep. 154; Hardy v. Railway, 89 Wis. 187, 61 N. W. 771.

*Phil H. Sheridan* and *Henry B. Davis* for respondent.

REYBURN, J.—This plaintiff was a passenger upon an electrically propelled car of defendant on December 5, 1902; at close of the day's work she had left her place of employment, boarding a street car at Sixth and Olive streets, in the city of St. Louis, and had transferred to a connecting car of defendant at intersection of the latter named street with Grand avenue, and proceeded northward on the Grand avenue line to Dodier street, near where she lived, and upon attempting to alight she received the injuries, the basis of this action. The plaintiff, a widow, about thirty-six years of age, set forth in her statement of the cause of action, that the servants and agents in charge of defendant's trolley car conducted it in a negligent and dangerous manner, so that when she attempted to alight at her destination, and while in act of alighting, the car was started and she was thrown violently to the ground, suffering both external and internal injury, her left hip lacerated, her nervous system shocked and her heart affected so that she was permanently injured.

The answer, after embodying a general denial, charged that plaintiff's injuries were caused by her own negligence in stepping from a moving car, before it had stopped for the purpose of allowing her to alight, and that she had failed to signal for the car to stop, until after it had reached the usual stopping place at Dodier street, and then gave the signal, and while the car was being brought to a stop, but before it had stopped in obedience to her belated signal, she negligently stepped

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therefrom while still in motion, without invitation, consent or knowledge of the conductor of her intention so to do, whereby she caused her injuries.

The evidence of the opposing parties tended to sustain the allegations of the respective pleadings, and continued conflicting, even in the testimony of the medical experts upon the extent of her injuries.

The court charged the jury in a series of instructions, of which the first on behalf of plaintiff complete was as follows:

"The court instructs the jury that a street railway company is bound to exercise in the transportation of its passengers, the utmost human skill, diligence and foresight, which is such skill, diligence and foresight as is exercised by a very cautious person under like circumstances. If, therefore, the jury find from the evidence that the plaintiff was, without any negligence on her part, injured while a passenger on the railway of the defendant in alighting from the trolley car of the defendant, and that the cause of such injury was the premature starting of the car by the servant or servants of the defendant, and that the servant or servants of defendant knew or by the exercise of the utmost human skill, diligence and foresight, as above defined, might have known that plaintiff was at the time in the act of alighting from the car of defendant, then the jury will find for the plaintiff and assess her damages at such a sum as the jury believe from the evidence will compensate the plaintiff for the injuries, pain and anguish already suffered by her and which she may suffer in the future from the effects of such injuries, and to this the jury may add such reasonable sum for medical attendance as plaintiff has paid or is liable to pay and such sum as will compensate her for loss of time, if any, your verdict not to exceed the sum of $25,000; if the jury find the plaintiff was not injured by reason of the premature

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starting of said car by the servants of the defendant, then the jury will find for the defendant."

From verdict and judgment for plaintiff, defendant has prosecuted this appeal.

This instruction is assailed in that the concluding portion, purporting to define the standard of damages, if any, to be awarded plaintiff, is violative of the rule that future damages must be confined to such injuries as shall appear from the evidence will reasonably result in the future from the injuries inflicted. The appropriate phraseology for such instruction has been inferentially adopted by the appellate courts of this State in a series of cases. In Chilton v. City of St. Joseph, 143 Mo. 192, the language adopted, to the effect that in estimating plaintiff's damages the jury might take into consideration not only the physical injury inflicted, the bodily pain and mental anguish endured and suffered, but might also allow for such damages as appeared from the evidence would reasonably result to her from such injuries in the future, was adjudged not unwarranted and predicated only upon such injuries as were the necessary concomitants and consequences of plaintiff's misfortune, superinduced by defendant's negligence. Similar wording was held unobjectionable in Russell v. Inhabitants of town of Columbia, 74 Mo. 480, which is depended upon as controlling authority in Ross v. Kansas City, 48 Mo. App. 440, also in Bradley v. Chicago, etc., Co., 138 Mo. l. c. 301-311.

The commentators upon this general subject are also in accord with each other and with the adjudicated cases. In a late treatise, it is declared that while the authorities are not in harmony as to the language to be employed in such instruction, they do not disagree materially as to the meaning of such language, and the weight of authority is that the evidence should show that it must be reasonably certain that future pain will necessarily follow and a mere probability of its occurrence

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is not sufficient. Voorheis, Measure of Damages, personal injuries, section 46, p. 75. Again another modern commentator, upon the same topic, states that in order that there may be a recovery for future consequences, it must be shown with reasonable certainty, that the results indicated will follow, and there must be more than mere conjecture to warrant an award of damages for future disabilities, and a charge that damages could be given for such consequences as are reasonably likely to ensue is proper. Watson, Damages, personal injuries, secs. 302, 303, p. 385 et seq. Other recognized text writers announce the same doctrine: "In ascertaining the amount of damages resulting from a personal injury the jury may consider the bodily pain and mental suffering which have occurred, and are likely to occur in the future, in consequence thereof as well as the loss of time, etc. The inquiry can not be extended to cover the merely possible consequences of the injury," etc. "The damages recoverable for bodily pain and suffering are not limited to that which is past, if the proof renders it reasonably certain that the party must suffer in the future. In estimating the pecuniary loss in such cases all the consequences of the injury, future as well as past, are to be taken into consideration, including bodily pain, which is shown by the proof, to be reasonably certain will necessarily result from the injury." Sutherland, Damages (3 Ed.), sec. 123, vol. 1, and sec. 944, vol. 3. "In order to authorize the recovery of present damages for a prospective loss, it must appear, that the occurrence of such loss or the existence of a disability in the future is something more than a mere possibility or probability. Such loss or future consequences for which damages are sought must be such as in the ordinary course of nature are reasonably certain to result from the injury." Joyce, Damages, sec. 244.

In a lengthy current of decisions from other jurisdictions, language involving the allowance of damages

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for future pain which is probable merely has been generally disapproved in charges to the jury. In Kucera v. Lumber Co., 91 Wis. 637, the instruction that plaintiff might recover for pain and suffering he was "likely to endure in the future" resulting from the injury, was pronounced error, upon authority of Hardy v. Milwaukee, etc., Co., 89 Wis. 183, where the language employed in the charge was for pain and suffering which plaintiff "may endure hereafter" and in same State, White v. Railway, 61 Wis. 536, the court condemned a finding that an injury "may prove permanent." In Fry v. Railroad, 45 Iowa 416, the jury were authorized to give damages for such future pain and suffering, as might be caused by the injury, and the court declared the instruction too broad and throwing open the door so wide that the jury could well enter the domain of conjecture, and indulge in speculation to a greater extent than allowable. The same legal principle is approved in Curtis v. Railroad, 18 N. Y. 534; Meeter v. Railway, 70 (Sup. Ct.) N. Y., 63 Hun 533; Cameron v. Union Trunk Line, 10 Wash. 507. In Bigelow v. Railway, 48 Mo. App. 367, the court, while sustaining the instruction impugned as improper, reiterated the rule, that in awarding compensation for future suffering the jury is not authorized to consider mere possibilities, and give damages for something that may happen, and reviewed at length some of the authorities above cited, including Fry v. Railroad, supra.

In the words in which the instruction in this case is framed, the feature condemned by the foregoing writers and reported cases is conspicuous; pecuniary compensation is not restricted to the prospective injuries, pain and anguish which, from the evidence, will reasonably result from the injuries, but the award of damages is to be measured as well by those she may suffer in the future from the effects of such injuries. The boundary of reasonable certainty is ignored, and the jury per-

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mitted under such instruction to give free rein to their respective imaginations and individual conjectures without lawful limits of reasonable certitude and probability clearly defined to guide the jury in its deliberation and finding. The judgment is accordingly reversed and the cause remanded. *Bland, P. J.*, and *Goode, J.*, concur.

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NENNO, Respondent, v. CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Appellant.

St. Louis Court of Appeals, March 29, 1904.

1. **COMMON CARRIERS: Connecting Lines.** Under the statute (section 944, Revised Statutes 1889), a common carrier which contracts to carry goods to their destination over connecting lines, is liable for damages occurring to such goods by the negligence of connecting lines, and it can not, in making such contract of carriage, stipulate to exempt itself from such liability.

2. ——: ——: **Conflict of Laws.** But where a contract was made in Illinois for the shipment of goods from a point in that State to a point in Missouri, over connecting lines, the statute of Missouri does not apply, and the carrier making the contract could limit its liability to damages which might occur on its own line.

3. ——: ——: **Connecting Station.** And the omission from the bill of lading of the name of the station where the goods were transferred to the connecting line did not affect the validity of the exemption.

4. ——: ——: **Conflict of Laws.** The presumption is that the common law prevailed in Illinois, and a statute of that State, similar to our own in relation to liability on connecting lines, could not be considered, unless introduced in evidence.

5. **JUSTICES OF THE PEACE: Pleading: Amendments.** Where there is no statement of any cause of action against some of several defendants, sued before a justice of the peace, there was nothing by which to amend as to them in the circuit court.

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6. ———: ———: Void Judgment: Appeals. A judgment rendered before a justice of the peace was void as to those defendants against whom no cause of action is stated and there was nothing to appeal from.

7. ———: ———: Waiver: Jurisdiction. And such defendants did not waive the want of jurisdiction in the circuit court to hear the case on appeal, by appearing to an amended complaint filed in that court and going to trial.

Appeal from St. Louis City Circuit Court.—*Hon. Daniel G. Taylor*, Judge.

Reversed.

*W. F. Evans* for appellant.

(1) Under the contract in the case at bar, the liability of the appellant ceased at the end of its own line. By said contract the appellant undertook to forward or transport the property only to the end of its own line, and deliver it to a connecting carrier, and that it should not be liable for damages occurring beyond that point. Patterson v. Railroad, 56 Mo. App. 657; Minter Bros. v. Railroad, 56 Mo. App. 282; Orr v. Railroad, 21 Mo. App. 333; Snider v. Adams Express Co., 63 Mo. 376; Coates v. U. S. Express Co., 45 Mo. 238; Dimmit v. Railroad, 103 Mo. 433. (2) Section 5222, R. S. 1899, has no application to this case or to the questions raised by this appeal. That statute refers and applies exclusively to shipments that originate in this State, and not to shipments in other States. It can not have any extraterritorial force. Stanley v. Railroad, 100 Mo. 435; Connell v. Western Union Tel. Co., 108 Mo. 459; Said v. Stromberg, 55 Mo. App. 438; First National Bank v. Hughes, 10 Mo. App. 7; State v. Gritzner, 134 Mo. 512. (3) It is well settled that a local agent of a railroad company has no authority to make a contract to transport freight beyond the end of the line of his company. Sew. Mach. Co. v. Railroad,

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70 Mo. 672; Turner v. Railroad, 20 Mo. App. 632. (4) The contract should be construed so as to give force and validity to all of its provisions, and so as to make them consistent with each other. Pensacola Gas Co. v. Lotzes, 2 So. 609; 2 Parsons on Contracts, 639; Fire Ins. Co. v. Roast, 45 N. E. 1097; Railroad v. Railroad, 44 O. St. 287. (5) As there was no petition, statement or cause of action filed in the justice's court against the appellant it was erroneous for the circuit court to allow an amended petition to be filed, or the original petition changed or redrafted against the Rock Island Company. Brashears v. Strock, 46 Mo. 221; Mortimer v. Yocum, 44 Mo. App. 277; Paddicord v. Railroad, 85 Mo. 160; Odle v. Clark, 2 Mo. 13; Brennen v. McMenamy, 78 Mo. App. 122; Barr v. Blomberg, 37 Mo. App. 605; Rosenberg v. Boyd, 14 Mo. App. 429. (6) As there was no petition, statement or cause of action filed in the justice's court against the appellant, the circuit court had no jurisdiction to allow the petition to be amended or redrafted against the appellant. (7) The same cause of action, and no other, that was tried before the justice shall be tried before the circuit court upon an appeal. R. S. 1899, sec. 4077. (8) In order to sustain judgment in the appellate court the petition of the plaintiff must state a cause of action. Nance v. Railroad, 79 Mo. 196; Peltz v. Eichele, 62 Mo. 171; State ex rel. v. Griffith, 63 Mo. 545; Bateson v. Clark, 37 Mo. 31.

*Jacob Oppenheimer* for respondent.

(1) The contract or bill of lading issued by the Chicago, Rock Island & Pacific Railroad Company was an agreement to transport the goods of plaintiff from Joliet, Illinois, to Crocker, Missouri. It was a through contract, wherein and whereby the Chicago, Rock Island & Pacific Railroad Company specifically agreed to

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carry respondent's goods to their destination, Crocker, Missouri. McCann v. Eddy, 133 Mo. 59; Elevator Co. v. Railroad, 138 Mo. 658; Eckels v. Railroad, 72 Mo. App. 296; Davis v. Railroad, 126 Mo. 69; Marshall & Antles v. Railroad, 74 Mo. App. 81; Jones v. Railroad, 89 Mo. App. 658. (2) The contract was made in the State of Illinois, and hence that law governs. Revised Statutes of 1898, of the State of Illinois, section 96, page 1255, reads as follows: "That whenever any property is received by any railroad corporation to be transported from one place to another within or without this State, it shall not be lawful for said corporation to limit its common law liability, safely to deliver such property at the place to which the same is to be transported, by any stipulation or limitation expressed in the receipt given for the safe delivery of such property." 160 Ill. 650; 194 Ill. 9; Railroad v. Smith, 74 Ill. 197; Railroad v. Boyd, 91 Ill. 268; Merchants' Dispatch Transportation Co. v. Furthmann, 149 Ill. 66. (3) The rule is that where goods are delivered to a railway company marked to a place not upon the line of its road, but beyond the same, . . . the law will imply an undertaking on the part of the carrier to transport and deliver the goods at the place to which they are marked. (4) When a common carrier undertakes to limit its liability by a special agreement with the shipper, it can claim nothing beyond what is plainly within the words employed in the contract. Richardson v. Railroad, 149 Mo. 311. (5) The petition filed in the justice court stated a cause of action; all the elements essential to a contract were therein stated. It showed relationship between the parties, consideration and non-compliance on the part of the appellant. Revised Statutes 1899, sec. 3957, permits the bringing in of parties, plaintiff or defendant, and allows mistakes to be corrected, such as was done in this case. 73 Mo. App. 117; 63 Mo. App. 540; 59 Mo. App. 347. (6)

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Plaintiff's petition stated a cause of action in the justice court, and the mere change of a title of a suit by bringing in a party defendant, or by interlineation of its name in the circuit court, after an appeal, does not constitute the making of a new suit. Church v. Railroad, 119 Mo. 203. Whenever a petition is defective or ambiguous, plaintiff should be allowed to amend. Price v. Ins. Co., 3 Mo. App. 262. (7) What constitutes a cause of action? The courts have laid down the rule that, if the same evidence will support the petition after amendment, and the same measure of damages will apply to the amended petition, it does not change the cause of action. Scovill v. Glasner, 79 Mo. 449; Sims v. Field, 24 Mo. App. 557; Lincoln v. Railroad, 75 Mo. 27; Moody v. Railroad, 68 Mo. 470; Lawrence v. Railroad, 61 Mo. App. 62; Lustig v. Cohn, 44 Mo. App. 271; Heman v. Fanning, 33 Mo. App. 50; Webb v. Robertson, 74 Mo. 380; Sturges v. Botts, 24 Mo. App. 282; Conn v. McCullough, 14 Mo. App. 584. (9) "The circuit court may permit a correction of a name of a defendant in the account where he is the appellant, so as to make it correspond with the name signed to the appeal bond." Murphy v. Sen, 3 Mo. App. 594; Dowdy v. Warnkey, 110 Mo. 280. An amendment is allowed by interlineation, by adding or striking out the name of a party defendant. South Joplin Land Co. v. Case, 104 Mo. 572.

STATEMENT.

This proceeding was commenced before a justice of the peace of the city of St. Louis, by lodging the following complaint:

"M. B. Nenno, plaintiff, v. St. Louis and San Francisco Railroad Company, a corporation, and Chicago, Peoria & St. Louis Railroad Company, a corporation, defendants.

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"Plaintiff for his cause of action against the defendants alleges that on or about the eighth day of November, 1901, he delivered to the Chicago, Peoria & St. Louis Railroad Company, certain household goods to be shipped from Joliet, Illinois, to Crocker, Missouri; that at the time of the arrival of said household goods a number of articles had been taken from the car, a list of which is hereto attached and made a part hereof.

"That plaintiff paid the regular charges demanded by said defendants for the safe transporation of said goods.

"Wherefore," etc.

Preceding trial, the justice dismissed the action as to the Chicago, Peoria & St. Louis Railroad Company, and upon the following application:

"Comes now the plaintiff in the above entitled cause and moves the court to make the Chicago, Rock Island & Pacific Railroad Company, a corporation, and the Terminal Railroad Association of St. Louis, a corporation, parties defendant in the above cause, and to issue summons against said parties for the reason that they should be brought into court as defendants in said cause for the proper determination of the plaintiff's rights," issued writs for the corporations thus made defendants which were served, and September 13, 1902, the cause was tried by the justice, and judgment rendered against the Chicago, Rock Island & Pacific Railroad Company, the St. Louis and San Francisco Railroad Company and the Terminal Railroad Association, which defendants jointly appealed to the circuit court. When the case was called for trial anew, appellant objected to introduction of any evidence, assigning that the statement filed before the justice did not state any fact upon which a judgment could be based against it; whereupon plaintiff was permitted to amend by striking out the



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words "Chicago, Peoria & St. Louis Railroad Company" and interlineation of the words "Chicago, Rock Island & Pacific Railroad Company" and "through the carelessness and negligence of defendants," so that the amended statement thus appeared:

"M. B. Nenno, Plaintiff, v. St. Louis & San Francisco Railroad Company, a corporation, and Chicago, Peoria & St. Louis Railroad Company, a corporation, defendants.

"Plaintiff for his cause of action against the defendants alleges that on or about the eighth day of November, 1902, he delivered to the Chicago, Rock Island & Pacific Railroad Company, Terminal Railroad Association of St. Louis and St. Louis and San Francisco Railroad Company certain household goods to be shipped from Joliet, Illinois, to Crocker, Missouri; that at the time of the arrival of said household goods a number of articles had been taken from the car through the carelessness and negligence of defendants, a list of which is hereto attached and made a part hereof. That plaintiff paid the regular charges demanded by said defendants for the safe transportation of said goods.

"Wherefore," etc.

The case progressed before the court as a jury, and plaintiff established delivery of household goods to the Rock Island corporation at Joliet, Illinois, November 8, 1901, for shipment to Crocker, Missouri, evidenced by bill of lading embracing among other terms the following:

"Received from M. B. Nenno in apparent good order, by the Chicago, Rock Island & Pacific Railway Company, the following described packages marked and numbered as per margin, subject to the conditions and regulations of the published tariff of said company, to be transported over the line of this railroad to (Peoria) and delivered, after the payment of freight, in like good order to the next carrier (if the same are

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to be forwarded beyond the line of this company's road) to be carried to the place of destination; it being expressly agreed that the responsibility of this company shall cease at this company's depot at which the same are to be delivered to such carrier."

At terminus of the Rock Island line, the city of Peoria, Illinois, the shipment was delivered to the Chicago, Peoria & St. Louis Railroad Company, and by it transferred at East St. Louis to the Terminal Railroad Association, which in turn made delivery to the St. Louis & San Francisco Railroad Company to complete transportation to its destination. The testimony failed to show any injury or damage while in possession of appellant, but established the safe delivery of the property at Peoria to the connecting carrier.

From judgment in favor of its codefendants and against it, the Rock Island Company has appealed.

The trial court, refusing declarations of law asked by appellant, that no recovery could be had against it, that the original statement filed failed to state facts sufficient to entitle plaintiff to recover against it, and the amended statement constituted a departure, gave the following:

"The court declares the law to be that under the bill of lading or contract sued upon in this action, the defendant Chicago, Rock Island & Pacific Railroad Company, was charged with the duty of transporting the goods of plaintiff mentioned in the bill of lading, from Joliet, Illinois, to Crocker, Missouri, and if the court, sitting as a jury find from the evidence that the defendant Chicago, Rock Island and Pacific Railroad Company, did not so transport said goods, but transported them or caused or suffered the same to be transported over various connecting lines, and further finds that at the time said goods reached Crocker, Missouri, that a part thereof had been lost, stolen, or not delivered to plaintiff in the same condition in which they were re-

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ceived, then the court sitting as a jury will find a verdict for plaintiff and against the Chicago, Rock Island and Pacific Railroad Company in such sum as from the evidence the court may find that he has sustained by reason of the premises."

REYBURN, J. (after stating the facts as above.)—1. In Coates v. U. S. Express Co., 45 Mo. 238, the Supreme Court of this State repudiated the English doctrine, that a carrier knowingly receiving a parcel consigned to a given place, contracted to carry it there unless a different understanding was made known to the owner, and approved the American rule then prevailing, to the effect that no responsibility as a carrier is imposed upon the receiving carrier beyond its own line after due care in forwarding; unless business usage, the custom of the carrier or its conduct showed that it received the freight as carrier for the whole route. The subject is now controlled in this State, as in many other States, by statute. The thirtieth general assembly, by act approved June 11, 1879, Laws of Missouri, 1879, p. 171, provided that a common carrier receiving property for transportation from one point to another within or without this State, should be liable for loss caused by its own negligence or the negligence of any other carrier over whose lines the property might pass and conferring upon the carrier receiving the shipment, recourse against the negligent carrier for damages it was required to pay, and this act has continued the law of the State. R. S. 1889, sec. 944. This legislation has received the consideration of the Supreme Court in numerous cases and has been adjudged valid, and not repugnant to any provision of the State or federal constitution, and it was further held by that tribunal that the receiving carrier might, by special contract, restrict its liability to such loss or damage only as occurred upon its own

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line. Dimmitt v. Railway, 103 Mo. 433; Nines v. Railway, 107 Mo. 475.

However, in the later case of McCann v. Eddy, 133 Mo. 59, the rule was abridged to the extent that such carrier can not contract for a through shipment to a point beyond its own line and at the same time exempt itself from liability for negligence, of the connecting or forwarding carriers completing the transportation. The ruling of the Supreme Court in the last cited case was affirmed by the Supreme Court of the United States (174 U. S. 580), which last decision was invoked in the last consideration of the act by the Supreme Court of Missouri. Western, etc., Co. v. Railway, 76 S. W. 998.

The shipment of the goods and the contract of transporation were made in the State of Illinois, at Joliet, and in absence of the above statute, the receiving carrier could limit its common law liability, and would not be liable beyond its own line. Snider v. Adams Ex. Co., 63 Mo. 376; Coates v. Railway, supra; Dimmitt v. Railway, supra.

It has not escaped notice that the bill of lading is silent as to the connecting point over the line of appellant, to which the shipment was to be transported, probably by omission to properly fill up the blank in the bill of lading for such insertion; but it is clear from the general terms of this evidence of the contract between the carrier and the shipper, that transportation merely to its terminal point and delivery there to the connecting carrier was intended.

In the case of Minter v. Railway, 56 Mo. App. 282, a like omission is perceived and thus disposed of by the court:

"We do not think the fact that the name of the station where the transition on its line ended was not mentioned in the bill of lading is of importance. Its exemption from liability under the special agreement set

forth in the bill of lading begun after it had safely, and without unreasonable delay, transported and delivered the plaintiff's oats to the connecting carrier. The language of the exemption clause was, we think, sufficiently specific for every purpose."

The same inaccuracy is manifest in the bill of lading considered by this court in Patterson v. Railway, 56 Mo. App. 657, and was regarded by the court as immaterial, and not affecting the restriction of the liability in the contract.

Respondent in argument invoked a statute of the State where the delivery of the goods to the first carrier was made, but it can not be considered, as no proof was introduced of its existence and the presumption obtains that the common law prevailed in that State. Edwards, etc., Co. v. Stevenson, 160 Mo. 516. No presumption can be indulged that the State of Illinois has enacted statutory laws identical with or similar to those of this State (Morrissey v. Wiggins Ferry Co., 47 Mo. 521); hence the liability of appellant as carrier was restricted to its own line, and converted into that of forwarding agent of the shipper for the connecting lines, completing the transporation as the Missouri statute was inoperative and could have no effect extraterritorially upon the agreement made in a sister State. Connell v. W. U. Tel. Co., 108 Mo. 459; Stanley v. Railway, 100 Mo. 435; State v. Gudener, 134 Mo. 572.

2. The complaint filed before the justice of the peace nowhere connects the Frisco Railroad with the reception or shipment of the goods, and hence no cause of action was stated against that company. The Rock Island and Terminal Companies were summoned on the motion of plaintiff to defend a cause of action, of which there was no statement whatever filed before the justice. The Peoria, the only company against which any cause of action was stated, was dropped from the suit and a judgment was rendered by the justice against the

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Frisco, Rock Island and Terminal Companies, from which they appealed. In the circuit court there was filed what is termed "an amended complaint" upon which the cause was tried. This complaint, though termed "an amended complaint," is in fact an original statement. It could not be otherwise, for the reason there was no statement whatever of a cause of action filed before the justice of the peace against these defendants, therefore, there was nothing by which to amend in the circuit court. Brashears v. Strock, 46 Mo. 221; Peddicord v. Railway, 85 Mo. 160; Rechnitzer v. Candy Co., 82 Mo. App. 311. There being no statement of a cause of action filed before the justice, his judgment, as is shown by his transcript, was an absolute nullity. Ex Parte O'Brien, 127 Mo. 477. There was, therefore, nothing to appeal from. Defendant objected to the amended statement filed in the circuit court. The defect, therefore, of the want of any statement by which to amend, was not waived by going to trial. Brashears v. Strock, 46 Mo. l. c. 223. To obtain jurisdiction of a cause three things are necessary. Black in his work on judgments (vol. 1, sec. 242) said: "First, the court must have cognizance of the class of cases to which the one to be adjudged belongs. Second, the proper parties must be present. And third, the point decided must be, in substance and effect, within the issue." In Railway Company v. State, 55 Ark. l. c. 205, the court said: "Jurisdiction is defined to be 'the right to adjudicate concerning the subject-matter in the given case.'" In Babb v. Bruere, 23 Mo. App. 604, jurisdiction is defined to be "the power to hear and determine the particular cause." In Hope v. Blair, 105 Mo. 85, it is said there are three essentials to jurisdiction. "First, the court must have cognizance of the class of cases to which the one adjudged belongs. Second, the proper parties must be present. And third, the point decided must be, in substance and effect,

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within the issue," thus approving and adopting the definition of jurisdiction given by Black in his excellent work on judgments.

One of the essential ingredients to vest jurisdiction in the justice was absent, that is, there was no issue presented by any statement or pleading of any cause of action whatever filed before him. He was, therefore, without jurisdiction to hear and determine any subject-matter pending before him. The justice being without jurisdiction none was conferred on the circuit court by appeal (Turk v. Funk, 68 Mo. 18; Sandige v. Hill, 70 Mo. App. 71), and it was not competent for the parties to confer jurisdiction on the circuit court by appearing and going to trial. White v. Railway, 72 Mo. App. 400; Bank v. Doak, 75 Mo. App. 332; Belshe v. Lamp, 91 Mo. App. l. c. 479; Fields v. Maloney, 78 Mo. 172; Barnett v. Railroad, 68 Mo. 56.

The judgment is therefore reversed. *Bland, P. J., and Goode, J.*, concur.

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ELLA MANNY, Admx. of BEN MANNY, Deceased, Respondent, v. LOGEMAN, Appellant.

**St. Louis Court of Appeals, March 29, 1904.**

**APPELLATE PRACTICE: Verdict. Where there was substantial evidence to support the verdict of a jury, it will not be disturbed on appeal.**

Appeal from St. Louis City Circuit Court.—*Hon. H. D. Wood*, Judge.

AFFIRMED.

*Geo. W. Lubke* and *Geo. W. Lubke, Jr.*, **for appellant.**

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(1) The verdict is not supported by the evidence, there being no exact or precise evidence as to the time consumed by plaintiff in the employment in question from which the jury might arrive at a proper verdict, and it should, therefore, have been set aside by the trial court. Moore v. Hutchinson, 69 Mo. 429; Baum v. Fryrear, 85 Mo. 151; Flanders v. Green, 50 Mo. App. 371; Meier v. Proctor, 81 Mo. App. 410. (2) Giving to plaintiff's evidence on the question of time consumed in the work in question its fullest effect, the verdict is manifestly excessive and should have been set aside by the trial court. Benson v. Railroad, 78 Mo. 504; Marshall v. Railroad, 78 Mo. 610; Nicholson v. Couch, 72 Mo. 209; Cameron Sun v. McAnaw, 72 Mo. App. 196. (3) The verdict indicates prejudice on the part of the jury against defendant, and should, therefore, have been set aside by the trial court. Gage v. Trawick, 94 Mo. App. 307; Cook v. Railroad, 94 Mo. App. 417.

*Xenophon P. Wilfley* for respondent.

The jury were the proper judges of the value of plaintiff's services. Their verdict in this case is supported by substantial evidence. The motion for a new trial on the alleged ground that the verdict is not supported by the evidence was properly overruled. Cosgrove v. Leonard, 134 Mo. 419; Rose v. Spies, 44 Mo. 20; Baum v. Fryrear, 85 Mo. 151; Tower v. Pauly, 76 Mo. 287; Pike v. Martindale, 91 Mo. 284.

REYBURN, J.—This is an action brought by the intestate of respondent for recovery of a balance, claimed for the reasonable value of his services as an expert bookkeeper, rendered by him with aid of three assistants, one of whom was an expert accountant, and one a stenographer. Their work, compensation for which was sought herein, consisted in the examination of the books of account of a business corporation trans-

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acting a business averaging $350,000.00 per year, and constituting the record of its affairs during a period of ten years and four months, and involving scrutiny of the corporate cash books, ledgers, journals, vouchers, etc. The defendant required the work to be done with the utmost celerity and dispatch, and as the books, the subject of investigation, were in use during business hours, part of the work was done by plaintiff and his three associates at the office of the corporation, during non-business hours at night and on holidays, from November 22, 1902, to February 21st, next ensuing, the memoranda and information being drawn off from the books in the evenings, and reduced to the form of a report during the daytime and when not working at the office of the company.

The answer admitted the employment and payments credited, and traversed the other allegations of the petition; proceeding, the answer further contained averments of a special contract for the employment of plaintiff, at a stipulated price named, and demanded a further small amount as a credit, to which the defendant was entitled on the account; the reply was a general denial.

The opposing parties introduced conflicting evidence upon the issues of the existence of an express contract for a sum fixed and agreed upon, and by necessary implication the jury found for the plaintiff upon this branch of the case. No evidence was tendered by defendant relative to the reasonable value of the services of plaintiff; but the testimony introduced on behalf of plaintiff, and given by himself, his associates and numerous experts, tended to establish, that plaintiff's bill was quite reasonable and the charges made by him were fully justified by the extent and value of the services, a view adopted by the jury in the rendition of a verdict for the full sum claimed, from judgment upon which, defendant has appealed.

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The errors assigned by appellant are based upon those grounds of the motion for new trial to the effect that the verdict is excessive, not supported by the evidence and must have resulted from passion and prejudice on the part of the jury against defendant. Under the rule clearly enunciated in the leading case in this State of Cosgrove v. Leonard, 134 Mo. 419, this court is required here merely to determine whether or not there was any substantial evidence to support the verdict, and if the verdict be upheld by sufficient evidence, this court is not authorized to interfere with the action of the trial court in overruling the motion for new trial. The answer to this inquiry is plain and obvious in this case, as not only was there abundant proof on behalf of plaintiff to justify the jury in the verdict rendered, but defendant made no effort to impair the weight and probative force of such affirmative testimony by any contradictory proof. The rule is firmly established both in the Supreme Court and in this court, that the appellate court will not trespass upon the province of the jury by weighing evidence, even where it is conflicting upon any specific issue, and this principle must apply with convincing effect, where there is an entire absence of conflict in the testimony or of opposing evidence. The conclusion and finding, whether of a jury or of a trial court sitting as a trier of the facts, if supported by substantial evidence, is binding and conclusive upon an appellate court. The record presented is barren of any circumstance, from which any suspicion of bias or prejudice on part of the jury toward defendant could be suspected or inferred. The only question, so far as disclosed in this appeal, is the value of the services of the deceased as an expert accountant and his trio of assistants in the work performed and under the extraordinary conditions under which it was prosecuted; no error is designated in the rulings of the court at the trial in the admission or exclusion of evidence or in the

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instructions, under which the case was presented to the jury, and there is no reasonable or tenable ground now exhibited for disturbing the verdict of the jury and the judgment is affirmed. *Bland, P. J.*, and *Goode, J.*, concur.

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KEYES-MARSHALL BROTHERS LIVERY COMPANY, Respondent, v. ST. LOUIS & HANNIBAL RAILWAY COMPANY, Appellant.

St. Louis Court of Appeals, March 29, 1904.

1. EXPERT TESTIMONY: Inferences From the Evidence. It is improper to ask an expert witness to give his opinion basing it upon evidence he has heard introduced.

2. ———: ———: Jury Must Weigh Oral Testimony. Nor is such expert evidence harmless error on the ground that the testimony on which it is based is undisputed, where such evidence is oral; under the practice now prevailing all testimony, not documentary, upon issues joined, must be submitted to the jury.

3. COMMON CARRIERS: Prima Facie Case: Animals. In an action against a common carrier for damages to horses shipped, the evidence showed the horses were received by the defendant in good condition, that in the course of transportation the car containing them was overturned, that when rescued from the car they bore marks of accident and subsequently they were shown to be unserviceable and one of them died within a month, a prima facie case was made out for the jury.

Appeal from Audrain Circuit Court.—*Hon. H. W. Johnson*, Judge.

REVERSED AND REMANDED.

*Geo. A. Mahan* and *J. D. Hostetter* for appellant.

(1) The court erred in permitting the alleged expert, E. B. Shaw, to give his opinion as to what was the trouble with the horses, basing it upon the evidence

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in the case. This was in effect usurping the province of the jury, and also involved the process of allowing the expert to pass upon the disputed points of the testimony, and to arrive at a conclusion from a consideration of disputed facts. An expert can not be permitted to give his opinion on the whole case or "from the evidence in the case" as that would necessarily include a determination of the facts and would invade the province of the jury. Lawson on Expert & Opinion Ev. (2 Ed.), 172; State v. Palmer, 161 Mo. 174; Tuizley v. Cowgill, 48 Mo. 298; Page v. New York, 10 N. Y. Supp. 826; Connelly v. Railway, 60 Hun 495, 15 N. Y. Supp. 176; Fairchild v. Bascomb, 35 Vt. 398; Graney v. Railway, 157 Mo. 682. (2) An expert should not be asked questions which require him to draw inferences or conclusions of fact from the testimony, or to pass on the credibility of the witnesses or to decide as to the weight of the evidence, or to reconcile conflicting evidence. Rogers' on Expert Testimony, 61: "The proper method, therefore, of obtaining the opinion of the expert upon the facts brought out at the trial, and which he has heard, is to state the evidence to him and ask him his opinion upon such hypothetical case, and not to ask him what his opinion is upon the evidence as he has heard it." McGuire v. Railroad, 51 N. Y. S. 1075; Key v. Thompson, 2 Hannay (N. B.) 224; Briggs v. Railway, 52 Minn. 36, 53 N. W. 1019. (3) The evidence does not show a legitimate inference that the condition of these horses resulted from the wreck. At most it is a bare conjecture, hence defendant is not liable and its instruction No. 1 should have been given. Plaintiff can not recover and the judgment should be reversed. Smart v. Kansas City, 91 Mo. App. 586; Smillie v. St. Bernard Dollar Store, 47 Mo. App. 406; Smith v. First Nat. Bank, 99 Mass. 612; Searles v. Railroad, 101 N. Y. 661; Cotton v. Wood, 8 C. B. (N. S.) 568. When the state of the evidence is such as to

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leave the result of the accident to be determined only by conjecture or surmise, the plaintiff must fail. Bond v. Smith, 113 N. Y. 378; Pauley v. Steam Co., 131 N. Y. 90; Linkhouf v. Lombard, 137 N. Y. 417.

*P. H. Cullen* and *Tapley & Fitzgerrell* for respondent.

(1) The manner of the examination of Dr. E. B. Shaw, if error, was harmless, as there was no conflict in the testimony. State v. Prewitt, 175 Mo. 228; State v. Palmer, 161 Mo. 174. (2) The appellant can not complain of the error if any in the examination of Dr. E. B. Shaw, as its counsel by the questions asked on cross-examination adopted the error, if any, of respondent. Goss v. Railroad, 50 Mo. App. 623. (3) If there had been a sharp conflict in the evidence as to the cause of the damages to the team of horses and appellant had not adopted the error if any, in its cross-examination of witness E. B. Shaw, there might have been some contention as to its objection to the questions asked the expert, but under the evidence adduced at the trial, it was not error. (4) However, said instruction was properly refused. There was ample testimony to submit the cause to the jury. Doan v. Railroad, 38 Mo. App. 408; Home v. Express Co., 48 Mo. App. 179; Same v. Same, 66 Mo. App. 486; Cash v. Railroad, 81 Mo. App. 109; Davis v. Railroad, 89 Mo. App. 140; Pacific Express Co. v. Emerson, 74 S. W. 132; Peay on Freight Carriers, 253.

STATEMENT.

Towards end of September, 1902, in Bowling Green, Mo., the plaintiff purchased a pair of horses for the price of six hundred dollars; at time of their purchase the animals were gentle and well broke, they had been driven in single and double harness by their

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former owners and by members of their families. When shipped to the purchaser, consigned to St. Louis over defendant's railroad, the horses were started in good condition, newly shod, their legs bandaged and they were tied separately at opposite ends of the car in proper condition for safe transportation. On the journey, within four miles of the town of Gilmore, while the train was running at a speed estimated at fifteen or twenty miles per hour, the car containing them was derailed, thrown down an embankment, and overturned, requiring the animals to be extricated through the roof, sawed open for that purpose. They were then led to Gilmore, and placed in a livery stable till the following afternoon, when they were reshipped and delivered to respondent at St. Louis. When removed from the wreck, their shoes were off, the bandages torn and down, and the animals scratched and bruised; upon arrival in St. Louis they were well cared for, blanketed and turned into box stalls, where they were permitted to remain without use for several days. After unavailing effort to drive them, they were returned to the stable, and after further interval of disuse, when taken out both were nervous and susceptible to fright at slight causes; one, the near horse of the team, was found distressed, unable to extend himself and could be driven but a short distance, and within a month dropped dead when about to be put in harness; the off horse was returned by boat to the firm which sold him at Bowling Green, and showed such disposition to run away that after trial he was sold without guaranty for $112.50 at auction. In developing the proof for respondent, a veterinary expert was permitted to give his opinion, basing it upon the evidence he had heard introduced, as to what was the trouble with the team, and to state the condition of the horses was attributable to the result of the casualty they had experienced in transit.

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REYBURN, J. (after stating the facts as above.) —1. The toleration of the mere expressions of opinions of skilled witnesses as lawful proof is a conspicuous exception to the fundamental law of evidence that the triers of controversies should form their conclusions from facts detailed by witnesses, and not from mere opinion of any witness, and the admission of this class of testimony should be guarded rigidly within its proper limits, and the conditions established by law under which such testimony is made admissible should be scrupulously regarded. In the employment of such proof, the rule is well settled that such witnesses should not be permitted to assume the province or duties of the triers of fact by expression of individual opinions upon the issues of fact on trial. As expressed by one writer upon the subject of expert testimony, an expert should not be interrogated in such manner as to cover the very question to be submitted to the jury (Rogers, p. 61): or as fancifully described in a case cited by such author, "A question should not be so framed as to permit the witness to roam through the evidence for himself, and gather the facts as he may consider them to be proved, and then state his conclusions concerning them." Dolz v. Morris, 17 N. Y. Sup. Court (10 Hun) 202. Another, a criminal case, sets forth the doctrine thus: "The superior knowledge of the expert is frequently required in the conduct of judicial examination of subjects beyond the reach of common observation. But this evidence has its restrictions, and must never be allowed to invade the rightful and exclusive province of the jury in drawing their own conclusions from the testimony of the credibility of which they alone must judge. It is their duty to hear and pass upon the evidence and the expert's opinion is admitted only to aid in performing that duty. It is obviously improper for any one, expert or non-expert,

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to express an opinion, warranted only by assuming the truthfulness and accuracy of what witnesses have testified. Such evidence is competent, only when founded on facts within the personal knowledge and observation of the expert, or upon the hypothesis of the finding of the jury." State v. Bowman, 78 N. C. 509.

In this State, in criminal and civil proceedings alike, this view has been adopted. State v. Palmer, 161 Mo. 152; Tingley v. Cowgill, 48 Mo. 291; Graney v. Railway, 157 Mo. 666. And authorities from other jurisdictions abound, additional to those quoted above, exhibiting varied situations and facts. Lawson Expert and Opinion Evidence, p. 173; Connelly v. Manhattan Railway Co., N. Y. Sup. 176; Briggs v. Railroad, 52 Minn. 36; Page v. Mayor, etc. 10 N. Y. Sup. 826; Fairchild v. Bascom, 35 Vt. 399; McGuire v. Railroad, 51 N. Y. Sup. 1075.

Nor is the answer of the respondent satisfactory, that as there was no conflict in the testimony, the error, if any, was harmless; under the practice now prevailing all testimony, not of a doctumentary character, where issues are joined, must be submitted to the jury, and while in the case cited and relied upon, the court under the peculiar circumstances presented, held that any error in permitting the medical expert to express an opinion as to the mental condition of the accused at the time of the homicide based on the evidence as he heard it, and as it was stated to him was not fatal, yet the court further declared the better practice to be, where the facts are controverted to address to the expert hypothetical questions, based upon the facts claimed to have been proven by the evidence, so that the jury might know the facts on which the expert's judgment was founded, and thus determine independently, as in its province, whether such facts were proven or not; otherwise the expert must depend on



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his memory and predicate his opinion on his recollection of the facts, thus becoming himself trier of the facts in the place of the jury. State v. Privitt, 175 Mo. 207. The method of examination of the expert was in violation of the above well-founded rule, and can not be sanctioned.

2. The liability of a railroad corporation, as shipper of animate freight, is the same as that of a common carrier respecting other classes of property received for transportation, excepting as to injuries resulting from the natural and inherent propensities of the animals themselves. Hutchinson, Carriers (3 Ed.), sec. 222; Ray, Negligence of Imposed Duties, p. 253. Under the proof made to the effect that the horses forming the team were in good physical and serviceable condition when tendered to and received by defendant for shipment, that in course of transportation a casualty ensued, by which the car containing them was overturned and thrown down an embankment, that when rescued from the reversed car they bore marks of the accident through which they had passed, and subsequently they were, and continued in unserviceable shape, timid, unmanageable, difficult to handle and consequently reduced in value, manifestly established a *prima facie* case properly for the jury. Pacific Express Co. v. Emerson, 101 Mo. App. 62 (74 S. W. 32); Hance v. Express Co., 66 Mo. App. 486; Cash v. Railroad, 81 Mo. App. 109.

The judgment is reversed and the cause remanded. *Bland, P. J.*, and *Goode, J.*, concur.

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## YOUNG, Respondent, v. PRENTICE, Appellant.

**St. Louis Court of Appeals, March 29, 1904.**

1. **PLEADINGS: Legal Conclusions: Informal Statement Good After Verdict.** A statement of a cause of action which pleads legal conclusions instead of stating the facts from which the right of action emanates is informal and defective, but must be held sufficient to sustain a verdict.

2. **ANIMALS: Trespass: Evidence.** In an action for damages sustained by plaintiff from the overruning of his premises by defendant's cattle, which escaped from defendant's farm, adjoining, the introduction by plaintiff of defendant's deed to the latter's farm, to show the extent of defendant's possession, was not reversible error.

Appeal from Lewis Circuit Court.—*Hon. E. R. McKee,* Judge.

AFFIRMED.

*Blair, Marchand & Rouse* and *N. W. Simpson* for appellant.

Respondent's complaint filed in this cause before the justice of the peace does not state facts sufficient to constitute a cause of action against appellant. R. S. 1899, sec. 4777, p. 1136; Sheehan & Loler Trans. Co. v. Simms, 28 Mo. App. 64. The court erred in admitting in evidence deed from W. J. Burnett to William H. Prentice, and objected to by appellant because it is an attempt to prove title and that is not the question involved, it is the possession.

*R. J. McNally, Linn Anderson* and *W. M. Hilbert* for respondent.

REYBURN, J.—This action was begun before a justice of the peace of LaBelle township, Lewis county, and a trial had before a second justice of the same

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township to whose court a change of venue was awarded, the cause of the action being thus exhibited:

"Plaintiff states that on the ——— day of September, 1902, a large herd of cattle belonging to defendant unlawfully left the enclosure of defendant in said county of Lewis, and entered upon the land of plaintiff, situated on the west part of section four (4), township sixty-one, (61) range eight (8) in said township of La Belle, and destroyed a large quantity of plaintiff's corn being and growing on his said premises, to-wit: one hundred and fifty bushels, and otherwise damaged plaintiff by tramping upon his said ground, all to the damage of plaintiff in the sum of sixty dollars.

"Plaintiff states that at and prior to the unlawful entry of said cattle upon his said premises, the law known as the stock law, declaring it to be unlawful for cattle and other animals to run at large outside the inclosure of the owner and requiring such owner to restrain same from running at large, was in full force, having been previously adopted by a majority of the qualified voters of said county of Lewis.

"Wherefore, plaintiff asks judgment," etc.

An appeal was taken to the circuit court where a jury returned a verdict for plaintiff and defendant has appealed.

At the trial it was agreed that the stock law (Art. 2, chapter 69, R. S. 1899) was in effect in Lewis county at the time of the alleged injury. The testimony revealed that the opposing parties occupied adjoining farms south of the Fabius river, which formed the northern boundary of both, excepting a tract of about nine acres belonging to respondent north of the river. South of the river appellant's grantor and respondent had maintained a division fence and this arrangement was respected after appellant took possession. Appellant had a line of fence extending along the south bank of his farm on his northern boundary through which cat-

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tle belonging to him were charged to have escaped and strayed across the river into respondent's nine acres on the north side of the Fabius river, destroying and consuming a large quantity of corn, the property of respondent. Appellant's position was that it devolved upon respondent to keep a water-gap across the Fabius river between his land and that of appellant and by connecting such water-gap on opposite sides of the river with the fencing on north and south banks, to prevent stock from trespassing upon his premises, or to have a temporary wire fence across the stream for the same purpose.

1. The statement of the cause of action is assailed as being insufficient in the facts stated, particularly in failing to contain averments to the effect that the cattle doing the injury were running at large; that appellant permitted them to run at large outside of his enclosure upon the day of the alleged trespass, in omitting to state that appellant was owner, lessee, or in control of the realty, that appellant had any enclosure of any land, and that he owned any cattle, on the date of the injury, which was running in an enclosure of appellant. The language employed in presenting the respondent's complaint was unnecessarily concise and may be condemned as reciting legal conclusions in lieu of pursuing the better practice of pleading the facts from which the right of action emanates, but regarded most critically it is but the informal or defective statement of a cause of action and not the statement of a defective right of action and must be held sufficient to sustain the verdict and good after judgment. R. S. 1899, sec. 672; Salmon Falls Bank v. Leyser, 116 Mo. loc. cit. 73; Buck v. Peoples, etc. 46 Mo. App. loc. cit. 562.

2. The admission in evidence of the deed from his grantor to appellant is urged as prejudicial error; the objection thereto was that it was an attempt to prove title which was not involved. It tended to establish the

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extent of appellant's occupancy and did not constitute fatal error even if improper. The objections urged against the admission of a series of questions involving the damages suffered by respondent in the loss of the corn injured by the cattle, may be disposed of collectively by the reply that they have severally been considered and in no case were the inquiries improperly directed or the answers thereto inadmissible, but bore directly upon the controversy.

3. The court was fully warranted in refusing the imperative instruction asked by appellant directing a verdict in his favor. There was abundant testimony justifying the submission of the plaintiff's right of recovery as developed by the testimony introduced in his behalf to the jury. Nor are the infirmities charged in other instructions given by the court sustained; the controversy was characterized by conflicting evidence upon the issues of fact, particularly appropriate for the consideration and decision of a jury; the case was submitted in a charge composed of numerous instructions, comprehending all asked by appellant except that directing a verdict in his favor, and no error has been displayed warranting a disturbance of the finding and the judgment is affirmed. *Bland, P. J.*, and *Goode, J.*, concur.

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## ROBINSON, Respondent, v. METROPOLITAN LIFE INSURANCE COMPANY, Appellant.

**St. Louis Court of Appeals, March 29, 1904.**

1. **PLEADING: Informal Petition: Demurrer: Objections to Evidence.** Where a petition wholly fails to state a cause of action by omission of some essential averment which can not be implied from the language, advantage of the failure may be taken by objection to the introduction of evidence.

2. **———: ———: Good After Verdict.** But where the facts requisite to constitute a cause of action are to be inferred from the petition, though it be defective in some of its averments, it will be upheld after verdict and advantage of the defect can not be taken by objection to the introduction of evidence.

Appeal from St. Louis Circuit Court.—*Hon. J. W. McElhinney,* Judge.

AFFIRMED.

*Nathan Frank* and *Richard A. Jones* for appellant.

(1) The petition of plaintiff does not state a cause of action. This pleading was assailed at trial by objection to the introduction of any evidence under it and after verdict by motion in arrest of judgment. (2) The constitutive facts which compose plaintiff's cause of action must be pleaded, not conclusions, for the latter are neither traversable nor demurrable, but are to be treated as no statements at all. The allegation of a conclusion of law raises no issue, need not be denied, is not admitted by demurrer, is wholly worthless as a statement, is entirely eliminated from consideration in testing the merit of a pleading, and is as though no statement had been made at all. Mallinckrodt Chemical Works v. Nemsich, 169 Mo. 397; Nagel v. Railway, 167 Mo. 89; Spears v. Bond, 79 Mo. 471; Stalis

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Furnishing Co. v. Wallace, 21 Mo. App. 130; Verdin v. St. Louis, 131 Mo. 151; Fuchs v. St. Louis, 133 Mo. 197; Sidway v. Land & Livestock Co., 163 Mo. 374; Guy v. Washburn, 23 Cal. 211; Kelley v. New Britain, 62 Conn. 232; People v. Village of Cratty, 93 Ill. 180; Roofing Co. v. Pub. Co., 140 Ind. Sup. 158; McLain v. Leicht, 69 Iowa 401; People's Mutual Co. v. Boesse, 92 Ky. 290; Lynch v. Forbesc, 161 Mass. 302; Scrogen v. Lumber Co., 41 Neb. 195; Day v. Duckworth, 40 N. Y. Sup. 378; Pennsylvania Co. v. Platt, 25 N. E. 1028 (Ohio); Sprague v. Fletcher, 67 Vt. 46; Laurenstein v. Fond du Lac, 28 Wis. 336. (3) The petition does not contain any statement from which it can be determined that, at the time of the commencement of the suit, nor at any time since anything has been presently due from defendant to plaintiff. This is an essential requisite and its omission a fatal defect. Brewer v. Swartz, 94 Mo. App. 392; Wright & Sons v. Insurance Co., 73 Mo. App. 367; Shaver v. Ins. Co., 79 Mo. App. 424. (4) Exhibits filed with the petition form no part thereof and can not be considered in determination of its sufficiency. Pomeroy v. Fullerton, 113 Mo. 453; Hickory v. Fugate, 143 Mo. 71.

*Walther & Muench* for respondent.

(1) The petition is sufficient. Sec. 60, Pattison's Forms Missouri Pleading; Howe v. Ins. Co., 75 Mo. App. 66; Green v. Sup. Lodge, 79 Mo. App. 183. (2) Especially after the verdict, when: (a) Every just intendment must be given to the allegations of the petition. Jones v. Phila. Underwriters, 78 Mo. App. 296; Murphy v. Ins. Co., 70 Mo. App. 78; Gustin v. Ins. Co., 90 Mo. App. 373; Boulware v. Ins. Co., 77 Mo. App. 639; Edwards v. Railroad, 74 Mo. 117; Hirsch v. Gr. Lodge, 56 Mo. App. 104; Pattison on Code Pleading, sec. 887; Keaton v. Keaton, 74 Mo. App. 174; Optical

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Co. v. Richards, 62 Mo. App. 410; Boudermant v. Ins. Co., 73 Mo. App. 477; Prendergast v. Ins. Co., 67 Mo. App. 426. (b) And all defects and omissions are cured where the issues joined were such as necessarily required on trial proof of the facts defectively stated or omitted. R. S. 1899, secs. 672-3; Richardson v. Farmer, 36 Mo. 36; Bank v. Leyser, 116 Mo. 73; Hurst v. City, 96 Mo. 168. (3) Where the petition omits a necessary allegation, but the course of the trial is the same as if such allegation had not been omitted, the petition may be amended by the appellate court and will not be remanded to the trial court for purpose of amendment. Rowland v. Sprauls, 21 N. Y. Supp. 895; Sawyer v. Railroad, 156 Mo. 477.

REYBURN, J.—The only question urged by appellant is the sufficiency of the statement of plaintiff's cause of action as follows:

"Plaintiff for cause of action states that defendant is a corporation incorporated under the laws of the State of New York and doing business and having an office in the City of St. Louis, Missouri.

"Plaintiff further states that she was, up to the time of his death, the wife of one John F. Robinson; that defendant on the 15th day of November, 1901, in consideration of payment by said John F. Robinson, to defendant of a premium of $22.21 semi-annually during his life, and not to exceed twenty years, executed and delivered to said John F. Robinson, its policy of insurance in writing whereby it insured his life in the sum of one thousand dollars for the benefit of plaintiff. The said policy is herewith filed and marked Exhibit A.

"Plaintiff further states that said John F. Robinson died at the city of St. Louis, on the 11th day of April, 1902, and up to the time of his death all the premiums accrued and due upon policy were duly paid, and that the said Robinson in all respects complied with the

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conditions and provisions of aforesaid policy, that plaintiff immediately upon the death of said John F. Robinson, notified defendant of said fact, and did make proofs of death to defendant, in the manner and to the extent required, by blanks furnished by said defendant, which proofs were approved by defendant. That plaintiff has duly demanded from defendant payment of the sum of one thousand dollars, the amount of said policy, but the same has not been paid by defendant nor has any part thereof been paid and defendant is now justly indebted to plaintiff in said one thousand dollars, together with interest from the 11th day of April, 1902, and costs for which plaintiff prays judgment."

The answer, upon which trial was had, admitted the corporate existence of defendant, denied, in general terms, all other averments of the petition, and then proceeded to plead specifically and at length affirmative defenses based upon charges of misrepresentations by the insured composing warranties, in consideration of which the policy was issued, and a tender of the amount received as the premium upon the policy was made. The affirmative matter of the answer was traversed by a general denial as plaintiff's reply; the answer is not presented in detail as no further error is complained of by appellant as occurring at the trial in which, under the instructions of the court, the jury found a verdict for plaintiff, and from judgment thereon this appeal is taken.

It is argued industriously and with vigor, that the above petition of plaintiff does not state a cause of action and does not set forth the constitutive facts comprehending plaintiff's right of action and alleged mere conclusions of law. This objection was preserved by objection to introduction of any evidence at the beginning of trial for the reason that the petition

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stated no cause of action, and by motion in arrest assigning, among others, the same ground. The question of the sufficiency of a petition when raised by demurrer thereto, differs materially from the question of its adequacy after answer, by way of objection to admission of any testimony, and in latter event, however informal, if the averments set forth defectively a cause of action, the objection is not to be sustained. Young v. Shinkle etc., 103 Mo. 324. This rule is well settled in this State that a cause of action defectively stated is good after verdict, and can not be taken advantage of at the trial by objecting to the admission of evidence; where the petition wholly fails to state any cause of action by omission of an essential averment, which by fair and reasonable intendment is not implied in the whole language employed in the petition, such objection to introduction of any evidence may be made in nature of an oral demurrer. Jones v. Philadelphia etc., 78 Mo. App. 296. If, however, facts requisite to constitute a cause of action are to be inferred from the petition taken in its entirety, though defective in some of its averments, it should be held ample after verdict, upon the theory that plaintiff will be presumed to have proven at the trial the facts inadequately pleaded. At its worst, the petition here exhibits a good cause of action imperfectly set forth, not a cause of action substantially defective, and the petition in the severest aspect is but formally, not radically defective, and it must be upheld after verdict. Seckinger v. Philbert, etc. Co., 129 Mo. 590; Salmon Falls Bank v. Leyser, 116 Mo. 51; Hurst v. City of Ash Grove, 96 Mo. 168; Buck v. Peoples, etc., Co., 46 Mo. App. 555; Sawyer v. Wabash Co., 156 Mo. 468. Measured by liberal rules of construction now prevailing, as well as by the express terms of the positive statute, there is no room left for doubting the sufficiency of this petition to support the verdict. R. S. 1899, sec. 629, 672.

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Judgment affirmed. *Bland, P. J.*, and *Goode, J.*, concur.

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## HILL, Respondent, v. WESTERN UNION TELEGRAPH COMPANY, Appellant.

**St. Louis Court of Appeals, March 29, 1904.**

1. **TELEGRAPH COMPANIES: Message: Failure to Transmit.** In an action against a telegraph company, under section 1255, Revised Statutes 1899, for failure to transmit and deliver a message, the petition which charged that the defendant "carelessly and negligently failed to transmit" the message, was sufficient without alleging failure to deliver. (Per Reyburn, J.)

2. **PRACTICE: New Trial.** The granting of a new trial on the ground that the verdict is against the weight of evidence is within the discretion of the trial court. and a ruling to that effect will not be disturbed in absence of evidence that such discretion has been abused. (Per Reyburn, J.)

3. **TELEGRAPH COMPANIES: Message: Duty to Transmit and Deliver.** In an action against a telegraph company, under section 1255, Revised Statutes 1899, for failure to transmit and deliver a message, the petition correctly stated the measure of defendant's duty in alleging that such duty was to transmit and deliver the message. (Bland, P. J., concurring.)

4. **——: ——: ——: New Trial.** An order granting plaintiff a new trial in that case should stand because the evidence shows that the message was not transmitted within a reasonable time. (Bland, P. J., concurring.)

Appeal from Butler Circuit Court.—*Hon. J. L. Fort*, Judge.

AFFIRMED.

*Dickson, Smith & Dickson* and *E. R. Lentz* for appellant.

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Respondent's cause of action is based upon a failure to transmit and deliver a message and therefore does not fall within section 1255, R. S. 1899, as said statute is penal in its nature and under the construction given it by the supreme and appellate courts of the State there can be a recovery only for failure to transmit a message. Connell v. Telegraph Co., 108 Mo. 459; Rixke v. Telegraph Co., 96 Mo. App. 406; Parker v. Telegraph Co., 87 Mo. App. 533; Wood v. Telegraph Co., 59 Mo. App. 236; Dudley v. Telegraph Co., 54 Mo. App. 391; Manz v. Railway, 87 Mo. 278.

*David W. Hill, pro se,* respondent.

(1) The petition states a cause of action. R. S. 1899, sec. 1255; Parker v. Telegraph Co., 87 Mo. App. 553. (2) It was the statutory duty of the agent of the appellant, at the time application was made to send this message, to plainly inform the applicant of the condition of the wires, messages, etc., and whether or not the message could be or could not be sent as required. R. S. 1899, sec. 1257; Smith v. Telegraph Co., 57 Mo. App. 259. (3) The decision of the court was against the law under the evidence, against the weight of the evidence and was for the wrong party and, therefore, the court committed no error in granting respondent a new trial. Friedman v. Pulitzer Pub. Co., 77 S. W. 340; Sturdivant Bank v. Wilson, 87 Mo. App. 534; Sinclair v. Narragansett, 87 Mo. App. 268.

REYBURN, J.—This appeal is prosecuted from the ruling of the trial court in sustaining plaintiff's motion for new trial in an action for recovery of the penalty imposed by section 1255, R. S. 1899, for failure charged to transmit a telegraphic message. The statement of the cause of action is assailed as defective, as founding the right of recovery not solely upon the failure of transmission, in the language of the statute,

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which, being of a penal character, exacts rigid construction, but also counting upon the failure to deliver the telegraphic dispatch. While the language condemned is employed and reiterated in the allegations of the complaint, the omission of the statutory duty is specifically charged in the form and words that defendant "carelessly and negligently failed to transmit said message from its office in the said city of St. Louis to its office in the said city of Poplar Bluff," and bringing the case manifestly within the meaning of the terms of the statute and the spirit and scope of the enactment; the essential allegation being thus made, the unnecessary words respecting actual delivery of the message are redundant and should be rejected or disregarded as surplusage. The grounds moving the court to award a new trial do not distinctly appear, but from the motion therefor, and the trial as portrayed by the record, it may be justly inferred that the trial judge concluded the finding was against the weight of the evidence. This action on his part was plainly within his discretionary powers and in absence of evidence of abuse of such power, of which this record contains no suggestion or suspicion, his ruling should not be disturbed. Stewart v. Todd, 92 Mo. App. 1, and authorities therein cited.

Judgment affirmed. *Bland, P. J.*, and *Goode, J.*, concur.

BLAND, P. J.—I agree that the order of the trial court granting a new trial shall stand, for the reason I think the allegation of the petition, that it was the duy of defendant to transmit and deliver the message, correctly stated the measure of defendant's duty. Parker v. Western Union Tel. Co., 87 Mo. App. 553. And for the further reason that the evidence shows the defendant did not transmit the message within a reasonable time.

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# HOWERTON et al., Respondents, v. IOWA STATE INSURANCE COMPANY, Appellant.

**St. Louis Court of Appeals, March 29, 1904.**

1. **INSURANCE: Value of Goods: Must Be Proven.** In an action on an insurance policy covering a stock of goods, it is necessary for plaintiff to prove the value of the goods at the time of the loss.

2. ———: **Valued Policy.** Section 7979, Revised Statutes 1899, having been enacted subsequent to sections 7969 and 7970, the term "property" used therein, relating to valued policies of insurance, embraces both personal and real property, as defined by section 4160 and is not limited to real estate under the provisions of sections 7969 and 7970.

3. ———: **Inventory: Waiver.** Where a policy of insurance on a stock of goods provides that an inventory should be taken within sixty days, but a rider was attached providing that an inventory should be taken at least once a year during the life of the policy, in an action on the policy, for the destruccion of the property, brought within a year, the failure to take an inventory was not a defense.

4. ———: **Books and Safe.** And where the compliance of plaintiff with another provision of the policy, requiring him to keep books, preserve them in a place of safety and produce them on demand, was put in issue by the pleading, and the evidence was inconclusive upon that point, the issue should have been submitted to the jury upon proper instructions.

5. ———: ———: **Instructions.** But instructions concerning that point were properly refused, where they included the question of compliance with the clause requiring an inventory, the time limit for taking which had not expired.

Appeal from Scotland Circuit Court.—*Hon. E. R. McKee*, Judge.

REVERSED AND REMANDED.

*Edwin C. Meservey*, *John D. Smoot* and *James C. Davis* for appellant.

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(1) The burden of proof was upon the plaintiffs to plead and prove the value of the property at the time or its destruction, and the amount of the loss. Joyce on Insurance, secs. 3769-3770; Wood on Insurance, sec. 42, p. 101; Green v. Ins. Co., 69 Mo. App. 430; Gustin v. Fire Ins. Co., 64 S. W. 179, 164 Mo. 172, affirming Gustin v. Ins. Co., 90 Mo. App. 373; Joy v. Ins. Co., 83 Iowa 15; Warshawky v. Ins. Co., 98 Iowa 226. (2) The character of the property insured being purely personal, a stock of goods which fluctuates each day in value, this was not a valued policy, the provisions of section 7969 and 7970 of the Revised Statutes of Missouri did not apply, and before the amount of the loss could be properly determined the burden or proof was upon the plaintiff to establish the actual value of the property at the time of its destruction. City of DeSoto v. Ins. Co., 74 S. W. (Mo. App.) 1; Millis v. Ins. Co., 68 S. W. 1066, 95 Mo. App. 211; Roberts v. Ins. Co., 72 S. W. 144, 94 Mo. App. 142. (3) The provisions in the contract of insurance sued on concerning the taking and preserving of invoices and the keeping and preserving of books of account were just and fair, and there was sufficient evidence in the record upon which same should have been submitted to the jury. Gibson v. Ins. Co., 82 Mo. App. 520; Burnett v. Ins. Co., 68 Mo. App. 346; Bunham v. Ins. Co., 63 Mo. App. 94; Crigler v. Ins. Co., 49 Mo. App. 16; Pearson v. Ins. Co., 73 Mo. App. 486; Keet-Roundtree D. G. Co. v. Ins. Co., 74 S. W. 469. (4) The court should have left it to the jury to compute the amount due plaintiff on the policy. Corbitt v. Mooney, 84 Mo. App. 645.

*Mudd & Pettingill* for respondents.

(1) The policy of insurance for $1,000 being admitted by the pleadings the value of the goods, at the time of the issuing of the policy, must have been, at

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least, $1,333.33 1-3. The face of the policy is evidence of this fact and it devolves upon the company to show that the stock had become depreciated in value at, or prior to the time of the fire. No company shall take a risk on any property in this State at a rate greater than three-fourths of the value of the property insured, and when taken, its value shall not be questioned in any proceeding. Revised Statutes 1899, section 7979; Gibson v. Ins. Co., 82 Mo. App. 521; 16 Am. and Eng. Ency. of Law (2 Ed.), pp. 864 and 959; Baker v. Assurance Co., 57 Mo. App. 565; Green v. Ins. Co., 69 Mo. App. 429; Gustin v. Ins. Co., 90 Mo. App. 373, 164 Mo. 172; Roberts v. Ins. Co., 94 Mo. App. 142; Millis v. Ins. Co., 95 Mo. App. 211. (2) The evidence shows that the respondents complied with the terms of their policy so far as making and preserving books and papers relative to their business. A rider attached to a policy controls the provisions in the body of the policy. When a condition in a fire insurance policy requires the insured to make an inventory once a year, the insured has a year from the date of his policy in which to make it though the policy runs for one year only. McCollum v. Ins. Co., 61 Mo. App. 352.

STATEMENT.

On October 11, 1901, the plaintiffs, respondents herein, purchased from the Gorin Mercantile Company, a general stock of merchandise and continued the business of retail merchants at Gorin, Missouri, until the fifth day of May, 1902, when their entire stock was destroyed by fire. On the twelfth of July, 1901, the Gorin corporation had obtained from defendant, appellant herein, a policy against loss or damage by fire to an amount not exceeding one thousand dollars upon its stock in trade; upon the purchase the insured indorsed this policy to respondents, which transfer was approved



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by appellant. The contract of insurance was evidenced by a policy designated the "mercantile form" and embracing numerous provisions, many of which are not involved, but such as bear upon this controversy will be presented and considered as they appear material. Appellant, on May 15, 1902, repudiated any liability upon the policy, and this action was brought thereon.

The petition exhibited the foregoing facts, coupled with the allegations that at the time of the issuance of the policy, and at all times from such date to the occurrence of the fire, the stock of goods insured was of the value of thirty-six hundred dollars, and that while the policy was in force, May 5, 1902, all the goods insured and of the value stated were destroyed by fire, and plaintiffs' loss thereon was thirty-six hundred dollars; it further contained averments of compliance by the assignor and by the plaintiffs of all the conditions of the policy, which was filed with and made part of the petition.

The amended answer, upon which trial was had, was made up of a qualified general denial, a specific denial of the value of the property destroyed and special defenses based upon the conditions of the policy. The first of such affirmative defenses set forth, that as one of the conditions material to the risk, the policy provided that the insured thereby covenanted and warranted to keep a set of books, showing a complete record of the business transacted, including all purchases and sales, and to take an itemized inventory of the stock of merchandise, covered by the policy, at least once every year, and to keep such books with the last two inventories securely locked in a fireproof safe at night, and at all times when the store was not actually open for business, and in absence of a safe, to keep them securely in another building not exposed to fire; and if such invoice had not been taken within twelve months prior to the date of the policy, the assured agreed to

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take an itemized inventory of the stock within sixty days thereafter, and in case of loss, the assured warranted and covenanted to produce and submit such books and inventories for examination, and as a condition precedent in case of loss, if assured should not have or should fail to produce or submit for examination such inventories or books, then no suit should be maintained on the policy against appellant.

The answer further quoted from the policy, as another condition attached to and made part thereof, that the assured thereby agreed to take an inventory at least once a year during the life of the policy, and to keep books of account correctly detailing all purchases and sales, and keep such inventory and books in a fireproof safe, or in some place secure against fire in another building during the hours the store was not open for business, and in case of loss that the assured agreed to produce such books and inventories and in event of failure to produce same, the policy should be void and no legal action maintainable thereon. The answer thereupon charged violations of such warranties and conditions, and consequent avoidance of the contract of insurance, and failure of right in plaintiff of recovery thereon. The answer continuing, embodied the averment that succeeding the fire, the adjusters of appellant went to Gorin to investigate the causes and circumstances of the fire, and demanded of plaintiffs the production of their books and invoices required by the above provisions of the policy, and plaintiffs informed the representatives of defendant, that they had no such books or invoices and same had not been prepared, kept and preserved as required by the terms of the policy, and could not be produced, and defendant relying on such statements informed plaintiffs the company was not liable and would require no preliminary proof of loss.

The reply contained a general denial, and the aver-

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ment that by agreement between plaintiffs, defendant and the original assured, at time of issuance of the policy, and in consideration of the payment of the premium, that the clause attempted to be interposed as a special defense first above cited from the answer had been abrogated and waived, and the paragraph following providing that an inventory should be taken at least once a year during the policy, and for keeping books of account and preserving such inventory and books in a fireproof safe or in some place secure against fire in another building during the hours the store was not open for business, and in case of loss for the production of such books and inventories, had been substituted in its stead in the form of a rider attached to the policy.

At the trial the execution and delivery of the policy sued on was admitted, and likewise its due assignment to plaintiffs. One of the plaintiffs testified to the destruction by fire on the date named of the entire stock; that plaintiffs had purchased the stock about seven months anterior to the fire, and had sold goods therefrom and replenished the stock by purchasing from wholesale dealers named. That no safe was kept but respondents preserved at the dwelling of the witness their books, containing a complete record of the business transactions, which were at all times accessible to appellant. No evidence was offered by plaintiffs tending to establish the value of the goods at the time of the fire, nor proof of the loss occasioned to plaintiffs thereby. At the close of the evidence offered by plaintiffs, defendant asked an instruction that under the pleadings and the evidence, the verdict of the jury should be for defendant, which the court declined and gave at instance of plaintiff the following:

"1. The court instructs the jury that under the law and the evidence their verdict must be for the plaintiff in the sum of one thousand dollars with interest

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thereon from the fifth day of July, 1902, at the rate of six per cent per annum.

"2. Your verdict may be in the following form: We, the jury, find for the plaintiff in the sum of one thousand and eight and thirty-hundredths dollars.

—————————————

"Foreman."

The defendant presented a series of instructions responsive to and submitting the defenses in its answer, which were refused by the court and will be considered in connection with the propositions upon which they are founded. A verdict for amount recited in the second instruction given was rendered and an appeal has ensued.

REYBURN, J. (after stating the facts as above). 1. Apart from and excepting statutory qualification presently discussed, the proposition may be justly designated as elementary that as a condition essential to recovery by plaintiffs upon the policy for destruction of their stock of merchandise, its value at the time of the loss should have been shown. The usual allegations of the valuation of this personalty and the resulting loss to plaintiffs were broadly charged in the petition, and the burden thus assumed of introducing proof in support of such averment devolved upon them. From the circumstances frequently attending a loss by fire, the legal rule adopted does not demand evidence conclusive in character or mathematical in certainty but merely the best obtainable under the conditions presented. The general rule is thus declared in an exhaustive treatise on the subject of insurance: "The amount of an insurance policy is held to be no evidence of the value of the property destroyed, and it is therefore necessary for the insured to prove the extent of this loss. Testimony which is of slight importance may be received to show the value of goods if it is the best which

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can be produced and tends to show such value." 4 Joyce, sec. 3769.

In Gustin v. Ins. Co., 164 Mo. 172, transferred from this court, the allegation of the value of the property was declared material, and that it should have been made, but as therein the parties both introduced proof of the value of the chattels insured, the omission was held remedied by the verdict. To same effect is Green v. Ins. Co., 69 Mo. App. 429; Story v. Ins. Co., 61 Mo. App. 534; Gustin v. Ins. Co., 90 Mo. App. 373.

2. The theory of the trial court, which is sought to be upheld by respondent, was that under the statutes of this State, the contract became a valued policy, and section 7979, R. S. 1899, is appealed to in support of such interpretation. This section, under title of an act relating to fire insurance and form of policies, was enacted by the thirty-eighth general assembly, approved March 18, 1895, and in the concluding clause declares that no company shall take a risk on any property in this State greater than three-fourths of the value of the property insured, and when taken its value shall not be questioned in any proceeding. This law was passed subsequent to the enactment of sections 7969 and 7970, which provided for valued policies on real estate, but expressly recited that they should have no application to personal property. It follows, that if the law enacted in 1895 is inconsistent with those sections, in so far as it is inconsistent with them, it takes precedence of them as an amendment of the law. The question then is: What does the word "property" as used in section 7979 mean? Does it mean only real property or personal property? Section 4160 of the statutes says the word "property" in a legislative act should be construed to mean real and personal property, unless such construction would be plainly repugnant to the intention of the Legislature or the context of the act. We see no reason why the word property in section

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7979 should not be construed to embrace both real and personal property. If the Legislature had intended it should apply only to real property, it is fair to suppose some limiting proviso would have been enacted, as in sections 7969 and 7970. We, think, however, it would be perfectly competent to show in defense of an action on a policy for loss by fire, that personal property covered by the policy, whether it was a stock of merchandise, or something else, had been reduced by sales, or that its value had depreciated before the fire. Insurance companies are in the habit of inserting clauses in their policies, as was done in the present case, providing for inventories, invoices and books to be kept by the insured in a place safe from fire, in order that the value of the consumed property may be ascertained when it consists of a stock of merchandise. It would be possible, therefore, to arrive at an approximately correct estimate of the loss in most cases. Be that as it may, the statute seems to us to be plainly susceptible of no other construction than that it embraces both personal and real property. This construction has been expressly put on it by the Kansas City Court of Appeals in a decision which is the only one so far that has taken note of the statute in question. Gibson v. Ins. Co., 82 Mo. App. 515. In none of the other cases was this statute called to the attention of the court or passed on.

3. The further objection is encountered that the conditions of the policy, respecting the making of an invoice and the keeping of books as pleaded and set forth in the paragraphs of the answer, were violated and not complied with. Applying the controlling rule of construction of a policy of insurance, that it must in all cases be liberally interpreted in favor of the insured (1 May, Insurance (4 Ed.), sections 174-175), by the so-called rider, which constituted an integral part of the policy (Crigler v. Ins. Co., 49 Mo. App. 11), the preceding provision governing the taking of inventory of the

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stock was modified, the period within which it might be taken was extended so as to permit the preparation of the invoice during the year succeeding the issuance of the policy, which had not terminated at the time of the fire. McCollum v. Ins. Co., 61 Mo. App. 352. The compliance by the assured with the requirements to keep books on account correctly detailing all purchases and sales, and to preserve them in some place secure against fire in another building, during the hours the store was not open for business, and to produce them on demand thereof, constituted an issue joined, and an instruction submitting this question to the jury should have been given, but the instructions asked upon this branch of the case were properly refused, as they contemplated the taking of an inventory as well, the time limit for the preparation of which, as above demonstrated, was unexpired at the date of the loss. Burnham, etc., v. Ins. Co., 63 Mo. App. 85; Burnett v. Ins. Co., 68 Mo. App. 343; Gannon v. Gas Light Co., 145 Mo. 502; Mineral Land Co. v. Ross, 135 Mo. 101; Wolff v. Campbell, 110 Mo. 114.

4. The instructions previously set forth and given by the court encroached upon the domain of the jury and should not have been given. Corbitt v. Mooney, 84 Mo. App. 645.

For the errors indicated the judgment is reversed and the cause remanded. *Bland, P. J.*, and *Goode, J.*, concur.

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# HALLWAY et al., Respondents, v. ECKLER et al., Appellants.

**St. Louis Court of Appeals, March 29, 1904.**

1. **ADMINISTRATION: Unavailable Asset.** In order that an executor may be entitled to credit on his final settlement for the amount of a note as an unavailable asset, he must make a reasonable showing that it could not be collected.

2. **———: Executor's Negligence.** Where a note was due an estate from the wife of one of two executors, for money loaned her by the testator, and the evidence tended to show that the husband, the executor, received the proceeds of the note as well as inheritances received by her from other estates, and the other executor showed no diligence to protect the estate, an order charging the executors with the amount of the note was proper, although she was wholly insolvent.

Appeal from St. Charles Circuit Court.—*Hon. H. W. Johnson,* Judge.

AFFIRMED.

*L. H. Breker* and *C. & C. J. Daudt* for appellants.

Executors are entitled on final settlement to credit for all debts where the debtor is insolvent, or where it has been impossible for the executors to have collected the debt by the exercise of due diligence. R. S. 1899, sec. 234; Powell v. Hurt, 108 Mo. 507.

*Brice Edwards* and *C. W. Wilson* for respondents.

(1) The burden was upon the executors to prove in a satisfactory way that the note of Frances Eckler was in fact unavailable. In re Haffey Estate, 10 Mo. App. 232; Powell v. Hurt, 31 Mo. App. 632; Julian v. Abbott, 73 Mo. 580. (2) If Henry Eckler, the executor, received from his wife, Frances Eckler, the fifteen hundred dollars for which sum the note was given, and also

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received the five hundred and three dollars that came to his wife by inheritance from her brother's estate in November, 1902, and received the four hundred dollars which his wife inherited from her father; or if Henry Eckler, the executor received and used this money in payment of his debts, then he owes the money to his wife, and her note is not unavailable. McGregor v. Pollard, 66 Mo. App. 324; Broughton v. Brund, 94 Mo. 169; White v. Cloriby, 101 Mo. 162. (3) This court will defer to the finding of the lower court, and will not assume to reverse the judgment on the ground that it is against the weight of the evidence. Fur. & Car Co. v. Davis, 86 Mo. App. 300; Swayze v. Bride, 34 Mo. App. 414; Caruther v. Williams, 58 Mo. App. 101; Hamilton v. Berggese, 63 Mo. 233.

GOODE, J.—Exceptions to the final settlement of Henry Eckler and Henry Debrecht, executors of the will of J. H. Eckler, deceased, were filed in the probate court of St. Charles county, May 21, 1903. All objections to the settlement except as to one item, were eliminated by agreement of the parties before the judgment of said court. The contested item was a credit claimed by the executors for a note given by Frances Eckler to the deceased, May 3, 1897, for $1,500, but amounting, with interest, at the time of the settlement, to $1,762.50. The executors averred that said note was uncollectible and as it had been charged against them in their inventory they were entitled to be credited with the amount of it. The probate court refused to allow that credit, held the note was an available asset and that the executors must account for it, and ordered the distribution of said amount, together with certain other assets in the hands of the executor, among the distributees of the estate. An appeal was taken to the circuit court of St. Charles county, where, upon a trial anew, the same result was reached and an appeal taken to this court.

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The point pressed here is that, on the evidence, the executors were entitled to be credited with the amount of said note and that the exception to that item of their settlement was improperly sustained. The decision of this point in an intelligent way, calls for nothing more than a resume of the evidence. The testator, J. H. Eckler, died January,1901, and the appellants qualified as executors of his will during the same month. The deceased was the father of Henry Eckler and the grandfather of Henry Debrecht, who were appointed executors of his will without bond. Frances Eckler, who was the wife of Henry Eckler, borrowed $1,500 from her deceased father-in-law May 3, 1897, and gave him the note in question, due one year after date and bearing interest at five per cent per annum. She and her husband lived on a farm and were in humble circumstances; in fact he was in debt more than $3,000. The day after she borrowed the money he paid off two incumbrances on his farm which amounted to about $1,300. He said he got the money to make those payments by selling crops from his farm; but his testimony in that regard, as in others, was unsatisfactory. He disclaimed any knowledge of what his wife did with the money, or that he ever received any of it from her. There was testimony that at her death, which occurred June 8, 1903, she left no means and there is no direct evidence as to what became of the sum borrowed from her father-in-law. Mrs. Eckler was an heir of her brother Frank Kemper, and her share of his estate was $503. On November 20, 1901, after her husband had qualified as executor of the will of J. H. Eckler, deceased, she executed to him the following assignment of her distributive share of the estate of her deceased brother:

"Know all men by these presents, that I, Frances Eckler, of St. Charles county, in the State of Missouri, for one dollar, to me in hand paid by Henry Eckler, of

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St. Charles county, in the State of Missouri, do bargain, sell, convey, transfer and assign to the said Henry Eckler all moneys due me and coming to me from the estate of Frank Kemper, Jr., deceased, for his use. And I, the said Henry Eckler, accept the said trust.

"Witness our hands and seals, this, the twentieth day of February, A. D. 1901.

"FRANCES ECKLER, (Seal)
"HENRY ECKLER, (Seal)."

Henry Eckler filed that written transfer of his wife's interest in Frank Kemper's estate in the probate court among the administration papers of said estate. In November, 1902, the estate of Frank Kemper was ready for distribution; but instead of Henry Eckler receiving his wife's share under the assignment she had executed to him, he allowed her to receive it in his presence, although at the time Mr. J. L. Breker, who was Henry Eckler's attorney, asked her to pay it on the note. It appears, too, that Mrs. Eckler received $400 from the estate of her own father, which sum she turned over to her husband. Henry Eckler swore he had no knowledge of what his wife did with the money she received from her brother's estate; that he got no part of it. He swore, too, that neither he nor his coexecutor endeavored to collect the note in question, because she was insolvent and an attempt to collect it would have entailed useless expense.

The foregoing facts tend to prove that Henry Eckler received the proceeds of the note and used it to pay his debts; that he purposely aided his wife in appropriating what was coming to her from her brother's estate, instead of trying to collect it himself and apply it in payment of her debt to the estate in his hands. She had no right to assign her inheritance to him as a gift and leave her indebtedness unpaid; and after she had assigned it, he had no right to allow her to collect

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and appropriate it. His conduct was inconsistent with his fiduciary duties and leads to the belief that he was serving his own interest instead of the estate's. Two judges reached that conclusion on the evidence, and we are asked to reverse their findings, as unsupported by the facts. Instead of discovering cause for such a ruling, we are morally certain that the findings below were in accord with the true facts.

There was no evidence to connect Debrecht with any fraudulent conduct in the matter, but he appears to have used no diligence as executor to protect the interests of the estate or collect the note which Mrs. Eckler owed. In order for these executors to be entitled to a credit on their final settlement of the amount of the note as an unavailable asset, it devolved on them to make a reasonable showing that it could not be collected. Julian v. Abbott, 73 Mo. 580. This they failed to do. No attempt was made to reach Mrs. Eckler's inheritance from her brother, nor to proceed against her in any way. Of course, if Henry Eckler got the proceeds of the note himself, by collusion with his wife when she made the loan, it was as much his obligation as hers; if, on the other hand, he borrowed it from her, he stood indebted to her as long as she lived for the amount borrowed and to her estate after her death. He was the responsible party, and, therefore, in that contingency, her note presumably is not uncollectible, there being no proof that he is insolvent. In any view of the matter, gross negligence was established on the part of the appellants, if not positive fraud. The judgment is, therefore, affirmed. *Bland, P. J.*, and *Reyburn, J.*, concur.

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# GRAHAM, Respondent, v. Estate of RACHAEL RAPP, Appellant.

St. Louis Court of Appeals, March 29, 1904.

1. CONTRACTS: Validity: Administration. Where the evidence showed that a decedent had intended to bequeath a certain sum to plaintiff, but did not do so, and had promised that plaintiff should be paid that sum after decedent's death if the bequest was not made, for extra services performed by the plaintiff, plaintiff's claim for the amount was properly allowed against decedent's estate.

2. ———: ———. Where a servant employed at stipulated wages, performed extra work with the expectation of receiving extra compensation, which the employer had promised in a definite sum, she was entitled to recover such sum, although she testified that she would have performed the services without any promise of compensation.

Appeal from Dunklin Circuit Court.—*Hon. J. L. Fort*, Judge.

AFFIRMED.

*Walker & Cox* for appellant.

(1) It is conceded that if plaintiff has shown an agreement to pay $500 for services performed and to be performed, she may recover under proper pleadings. But we contend that plaintiff must show an agreement express or implied to pay for such services. Swan v. Dale, 90 Mo. App. 87. (2) Where a claim of this kind is not asserted until after the alleged debtor's death, and particularly where it covers a long period of time, the staleness of the claim is calculated to awaken suspicion of its validity, and nothing short of unequivocal evidence of the truth of the claim will satisfy the plainest demands of justice and good faith. Woerner's Am. Law of Admn., sec. 825. (3) Services rendered on

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mere expectation of legacy do not constitute a good cause of action. Miller's Estate, 136 Pa. St. 239. (4) The evidence of a promise to pay for services (and not a promise for love and affection) should be direct and positive. King's Estate, 150 Pa. St. 143; Sloniger v. Sloniger, 161 Ill. 270. (5) Where a party voluntarily does an act or renders a service, and there is no intention at the time that he shall charge therefor, or that the other party shall pay, he can not recover for such service. Kammerman v. Wiggington, 70 Mo. App. 476; Allen v. College, 41 Mo. 309.

*C. P. Hawkins* and *Wilson Cramer* for respondent.

Appellant cross-examined the plaintiff, and thereby waived any question as to the admissibility of her testimony. Foster v. Railroad, 115 Mo. 183; Burden v. Trenton, 116 Mo. 373; Cash v. Coleman, 145 Mo. 649; Estate, Soullard, 141 Mo. 642; Ins. Co. v. Vett, 142 Mo. 569; Faber v. Railroad, 139 Mo. 284; Sprague v. Sea, 152 Mo. 327; Shannon v. Carter, 99 Mo. App. 134; Moore v. Coleman, 95 Mo. App. 202; Strother v. DeWitt, 98 Mo. App. 293; Lillard v. Wilson, 178 Mo. 145; 15 Am. and Eng. Ency. Law, p. 1074 to p. 1083, 67 S. W. 285, 60 Mo. App. 558; 86 Mo. 197; 167 Mo. 342.

GOODE, J.—This proceeding was instituted in the probate court of Dunklin county by respondent presenting a demand for five hundred dollars against the estate of Rachael Rapp, alleged to be due respondent on an understanding between her and Rachael Rapp, that she should be paid that sum when said Rachael died, for services rendered by the respondent in superintending and managing a hotel conducted by the deceased in the town of Malden. Respondent was in the employ of Mrs. Rapp as a domestic for eighteen years; during most of the time in the hotel. Her principal duties were those

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of a dining-room girl; but in addition, she helped manage the house, and in truth, entirely controlled it during long periods when Mrs. Rapp was absent on account of her health. She appears to have been greatly relied on by the deceased in conducting the household affairs and her services in that respect were recognized as extra work which entitled her to extra compensation besides her regular wages. The testimony leaves no doubt that Mrs. Rapp promised respondent such extra compensation, to be received by the respondent when she (Mrs. Rapp) died. The deceased cherished a purpose to provide for the respondent by her last will, as was conclusively proven by several witnesses and not denied by the administrator of the estate. A short time before her death Mrs. Rapp sent for Mr. Cox, who is now one of the attorneys for the appellant, with the view to making her will, and told him she wanted to bequeath $500 to the respondent. The position of the appellant is that the demand must be rejected because the evidence discloses no more than an unperformed intention on the part of the deceased to make such a bequest. Doubtless the evidence shows an intention to make testamentary provision for the respondent. Mr. Cox testified that in the conversation he had with the deceased she explicitly declared that intention and was only deterred from then carrying it into effect by the fact that she had not fully made up her mind how to dispose of the rest of her estate and hence deferred making her will. But the testimony shows, too, that the deceased intended the respondent should get $500 at her death whether she made a will or not; that the payment of it should depend on no contingency in respect to the will. Mr. Cox swore she said to him on the occasion mentioned, that if she did not make a will, she wanted either him or Mr. Walker to see that Miss Graham got $500 of her estate. The conclusion is inevitable that the deceased, while she contemplated a bequest to the respondent, fully intended

and agreed that respondent should receive the $500 which had been promised her for extra work if the bequest was not made. The understanding was more definite in this instance than such agreements usually are; for the amount to be paid was stipulated. Such contracts are enforced. Sprague v. Sea, 152 Mo. 327; Shannon v. Carter, 99 Mo. App. 134.

Appellant's further contention is that the extra services were voluntarily rendered and not in consideration of promised compensation; that they were rendered out of kindness of heart merely. While the testimony will bear the inference that respondent would have performed all the extra work she did had no reward been promised her, it is clear she was promised a reward and understood all the time she would get it when Mrs. Rapp died, either in the form of a legacy or by payment out of the proceeds of the estate. Respondent herself testified that for years Mrs. Rapp told her she should have $500 and that if it was not bequeathed by will, she should have it out of the estate; that she wanted the respondent to have it for her extra work. Mrs. Rapp further said she thought her relatives would not contest the allowance.

A witness, T. B. Bradley, testified to a conversation with Mrs. Rapp three or four years before she died in which she said she wanted Miss Graham "to have $500 for services she had done and for being so good to her and Mr. Rapp." Said witness testified as follows on the subject:

"Did you get the impression from this conversation with Mrs. Rapp that she wanted Miss Graham to have $500 out of her estate by reason of her doing extra services for her outside of her employment? A. Yes, sir.

"Q. That is the way you understood it? A. Yes, sir.



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"Q. Did she say it was for extra services, or for being good to her; did she leave the impression upon your mind that she considered that she owed her that much, or that she was going to give her that much? A. She left the impression, this way, that Miss Sarah had been good in helping her and that she was going to give her $500."

Appellant's opposition to the allowance is based mainly upon the following testimony given by the respondent:

"Q. You worked outside of the dining room work? A. Yes, sir; I done it because I thought it ought to be done, and Mrs. Rapp was nice to me and because she was going to give me this $500, but I didn't do it on that account.

"Q. When did she discuss with you that you could get this, if she didn't leave it in a will? A. She did it several times three or four years before she died; she said she did not think her people would be contrary about it at all; she said they knew I had worked and how much trouble she would have had, had I not been with her."

The argument is that as respondent said she did not perform the extra work because of the promise to give her $500, therefore she can not recover. The fair inference from all her testimony, as well as all the testimony in the case, is that she would have rendered the extra services without any promise of payment and from sheer generosity of nature. But as she was actually promised payment and worked in expectation of it, it does not follow that she ought not to receive it. Both the probate and the circuit court allowed the plaintiff's demand, and the evidence fairly supports their decisions. At the trial in the circuit court all the declarations of law asked by the appellant were given. The theory of those declarations was that if the services were rendered without any understanding that they

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were to be remunerated and from the promptings of a kindly disposition, the respondent could not recover; further, that if the only remuneration promised was a legacy in the last will of the deceased, the demand should be disallowed. Declaring the law in that form and then allowing the demand shows the circuit court found, not only that an understanding existed that the respondent was to be remunerated, but an understanding, too, that the remuneration should not be contingent on a bequest. The evidence admits of that interpretation and the judgment is affirmed. *Bland, P. J.*, and *Reyburn, J.*, concur.

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FALKINBURG, Respondent, v. DAGGS, Appellant.

**St. Louis Court of Appeals, March 29, 1904.**

**PARTIES: Verdict Conclusive. Where the testimony was conflicting as to whether the plaintiff was the sole party in interest, and the question was submitted to the jury by appropriate instruction, the verdict is conclusive.**

Appeal from Clark Circuit Court.—*Hon. E. R. McKee*, Judge.

AFFIRMED.

*O. S. & G. M. Callihan* for appellant.

*Whiteside & Yant* for respondent.

GOODE, J.—This is an action to recover for services consisting of sawing timber and threshing grain rendered by the plaintiff to the defendant. A counterclaim was preferred for certain machinery, belting, lumber and other articles sold and furnished the plaintiff by the defendant.

Plaintiff had judgment and the defendant appealed.

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But one point is made for a reversal and that is that John D. Falkinburg was not the sole party in interest, for the reason that the sawing and threshing were done by the firm of John D. Falkinburg & Son, an alleged partnership consisting of the plaintiff and his son James Falkinburg. Some things were said in the testimony of the plaintiff that look like he and his son were in partnership, while other portions of his testimony, and the testimony of James Falkinburg, go to prove that the latter was working for his father. It is inferable from the plaintiff's testimony that the work was done by him and his son James, or rather his two sons, and that he regarded it, as he says, as "a family matter." There was testimony, too, that he paid his son James for his work.

The issue of whether there was a partnership was submitted to the jury by appropriate instructions requested by the defendant, which told the jury that if they found there was, the plaintiff could not recover. There being contrary testimony on the subject, the finding of the jury in favor of the plaintiff is conclusive and the judgment is affirmed. *Bland, P. J.*, and *Reyburn, J.*, concur.

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## McCARTY, Appellant, v. ST. LOUIS & SUBURBAN RAILWAY COMPANY, Respondent.

**St. Louis Court of Appeals, March 29, 1904.**

1. **CARRIERS OF PASSENGERS: Passenger. One may become a passenger on a street car in attempting to get on a car at a place where people are expected to take passage, though his attempt fails; but a man does not become a passenger by making such an attempt where he is not expected, when the motorman is ignorant of his presence.**

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2. ——: ——: **Negligence of Carrier.** Where one attempted to board a car when it was stopped, but not for the purpose of receiving passengers, nor at a place where passengers are usually received, the carmen in charge of the car were not guilty of negligence in suddenly starting the car so as to throw him off, unless they knew he was attempting to get aboard; they were not bound to watch for passengers at that place.

3. ——: **Negligence of Carrier: Hand Rail.** Where plaintiff, in an action against a street railway company for damages received while attempting to board one of its cars, proved that the handrail, which he clutched to aid him in getting safely on, gave way and he was thrown off and injured, he made out a prima facie case of negligence on the part of the defendant which proximately caused his injury.

4. ——: —— **Usual Place.** And this is true though the plaintiff was attempting to board the car at a place where passengers are not usually received.

Appeal from St. Louis City Circuit Court.—*Hon. H. D. Wood*, Judge.

Reversed and remanded.

*Carter & Sager* for appellant.

(1) It was error for the court to instruct that defendant owed plaintiff no duty if the place at which plaintiff boarded the car was not a usual and customary place for stopping to receive passengers, unless defendant's conductor saw plaintiff attempting to board the car while it was standing still and so seeing plaintiff negligently started the car before plaintiff was safely on the car, etc. Ashworth v. Railway, 59 L. R. A. 592; Williams v. Kansas City, etc., 96 Mo. 275; Meriwether v. K. C. Cable Co., 45 Mo. App. 528; Schepers v. Railroad, 126 Mo. 673. (2) The fact that the stop was made for a purpose other than the receipt or discharge of passengers does not alter the liability of the carrier toward one who attempts to become a passenger when it is customary for the cars to take on passengers at such points. (3) The court erred in instructing the

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jury that there was no evidence of negligence on the part of defendant on account of the handrail giving away, and in telling them that they should under no circumstances find for plaintiff on that ground. (4) This is not the law. The doctrine of *res ipsa loquitur* applies here. The fact that the handle gave way is evidence of defendant's negligence which puts the burden on it to show that it used due care and diligence to provide a safe handle and keep it in safe condition. Hite v. Railway, 130 Mo. 132; Sharp v. Kansas City Cable Co., 114 Mo. 103; Lemon v. Chanslor, 68 Mo. 340; Furnish v. Railroad, 102 Mo. 452; Clark v. Railroad, 127 Mo. 197; Hipsley v. Railroad, 88 Mo. 348; Crudy v. Railroad, 85 Mo. 79; Sawyer v. Railroad, 37 Mo. 259; 10 Central Law Journal 261.

*McKeighan & Watts* and *Wm. R. Gentry* for respondent.

GOODE, J.—This plaintiff got hurt in attempting to board one of the defendant's cars. The accident occurred on Seventh street a little south of Franklin avenue, in St. Louis, about six o'clock p. m., December 2, 1902. The car in question at that time ran from Locust to Seventh, thence north to Franklin avenue, thence west over the tracks of the St. Louis Transit Company, pending repairs to the defendant's tracks on Seventh street. There was a switch just south of Franklin avenue, but not at the crossing, and the car stopped to throw the switch so as to go around the curve in the track into Franklin avenue. Plaintiff was awaiting its arrival, anticipating that it would stop. He said it did so and that he stepped on the first step of the rear platform and had his other foot raised above the second step, when the car started, destroyed his balance, he grabbed a handrail, which gave away in his struggles to maintain his position on the step, threw him on the

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street and hurt him. Other witnesses swore plaintiff attempted to board the car while it was moving.

The acts of negligence charged against the defendant are, starting the car suddenly before the plaintiff was fairly on and allowing the handrail to become loose, when, by the exercise of care, its unsafe condition could have been detected and repaired.

The answer, besides a general denial, alleges that plaintiff's own negligence in boarding the car while it was in motion caused or contributed to his injury.

An ordinance of the city of St. Louis was introduced which required street cars to stop on the far crossings of intersecting streets to receive passengers, and motormen to bring their cars to a full stop at such corners when requested or signalled by a person standing thereat and desiring to take passage.

It will be observed that the plaintiff attempted to board the car slightly south of the near crossing, instead of at the west, or far, crossing, of Seventh street and Franklin avenue. He stepped on the car when it stopped to throw the switch just south of Franklin avenue, and justified his action by testifying that he had seen others do so. Plaintiff admits, however, that the west crossing was the usual and customary place for taking passage on street cars.

There was no testimony that either the motorman or the conductor saw the plaintiff before or at the time he attempted to get aboard, or knew he desired, or was trying to become a passenger. The motorman was at his proper place on the front platform, while the conductor was at the center of the car inside, and was not shown to have been looking toward the plaintiff.

Complaint is made here of the refusal of the court to grant two instructions. One related to the handrail and will be noticed further on. The other was that, if while the plaintiff was attempting to board the car for the purpose of becoming a passenger, and while he

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was in the exercise of ordinary care, he was thrown to the ground and injured through the negligence of the servants of the defendant in charge of the car in starting it before he was safely aboard, the verdict should be for him, provided said servants knew, or by ordinary care might have known, before starting the car, that he was boarding it and had not reached a place of reasonable safety. The court gave that instruction, not as asked, but with a modification that if the carmen knew the plaintiff was boarding it when they started, the defendant was liable; omitting the hypothesis of liability if they might have known that fact by ordinary care.

The defendant had a verdict and the plaintiff appealed.

The jury were instructed on the theory that the carmen owed the plaintiff no duty when starting unless they knew he was trying to board the car—that they were not bound to be on the lookout for passengers at that point, and, hence, that the jury should not be permitted to return a verdict against the defendant on a finding that its servants might have known what the plaintiff was about if they had used proper care. The theory of plaintiff's counsel is that the carmen can be convicted of negligence in starting the car while plaintiff was endeavoring to get safely aboard, if they either knew his position, or by due care, might have ascertained it. The postulate of this argument is that the carmen were bound to watch for would-be passengers when they stopped the car at the switch. If the testimony had shown it was usual to receive passengers there, the plaintiff's position would be well taken. But the only testimony on the subject was his own, and it went no further than the statement that he had previously seen men and women board cars where he did. People occasionally get on street cars anywhere along a street, when they happen to stop, or even while they are running; but proof of that fact would not establish

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a custom to receive passengers anywhere and bind carmen to be always alert. If there was a usage to take passengers at the switch, the carmen would have been bound to watch and be as careful about starting there as at far-crossings, the common and appropriate localities for taking passage; for then persons would have a right to board cars and the operatives good reason to expect them to do so. Washington, etc., Railroad, v. Grant, 11 App. Cas. (D. C.) 107; McNulta v. Euch, 134 Ill. 46; West Chicago St. Ry. v. Manning, 170 Ill. 417; Id., 70 Ill. App. 239. But that people had theretofore got on cars at the switch did not make out a custom in the absence of evidence as to how many had done so and for how long. We are asked to take notice that the defendant company, and street railway companies generally, receive passengers wherever a car happens to stop. We are willing to notice as a well known fact, that companies tolerate persons getting on street cars wherever they stop, or, as said, when they are in motion; but are unwilling to notice, as of common knowledge, that the public is invited to do so. The fact is quite the other way, we think.

A person becomes a passenger on a street car by a contract, express or implied. He may become one in attempting to get on a car at a place provided for that purpose, and where people are expected to take passage, though his attempt fails. Webster v. Railway, 161 Mass. 298; Chicago, etc. Ry. Co. v. Jennings, 190 Ill. 378, 54 L. R. A. 827. But a man does not become a passenger by making such an attempt at a place where he is not expected and when the carmen are ignorant of his presence. As was said in Washington, etc., Co. v. Grant, supra: "If a person voluntarily alights from a street car in motion or when at a place or in a position *where passengers are not intended or expected to get off the car,* the passenger so getting off or on the car takes the risk of injury by the sudden starting up of the car,

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and the employees who so start the car are not negligent *if they are ignorant that the passenger is so alighting from or getting on the car.*" See Nichols v. Railroad, 106 Mass. 463; Grabenstein v. Railway, 84 N. Y. Supp. 261; Mitchell v. Railroad, 51 Mich. 236. The case differs from that of a man who, by license of a defendant, was in a place so usually occupied by persons, that the defendant was under the duty of looking out for his welfare. As the proof stands, this company was no more bound to be on the lookout for passengers where the accident occurred, than at any other point a car may stop because of some impediment. We conclude that the carmen were not remiss in failing to notice the position of the plaintiff before they started, and that the trial court did right in confining the jury's attention to the issue of whether they knew plaintiff was attempting to get aboard at that time.

The handrail pulled away from the car when the plaintiff clutched it to keep from falling from the step, and the inference is fair that otherwise he would have maintained his position; and if he would, the loosening of the handrail was the proximate cause of the injury. The trial court refused to charge that if the plaintiff was injured by the rail giving way, the verdict should be for him if the jury found he was exercising care; provided they found the handrail was insecure and that the fact was known to the defendant or might have been by the exercise of ordinary care. At defendant's request the jury were told there was no evidence of negligence on the part of the defendant in reference to the handhold, and that plaintiff was, under no circumstances, entitled to recover on the ground that the handhold became unfastened.

There was no evidence that the defendant was negligent and to blame for the giving way of the handhold except the fact that its fastenings let go under the strain of plaintiff's struggle. Plaintiff was using the handrail for its proper purpose, namely,

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to assist persons in getting on and off the car. That it gave way while thus used we regard as sufficient evidence of negligence on the part of the defendant to shift the burden of proof to it, as the party in possession of whatever evidence there was to exonerate it from blame. In the ordinary course of operating street cars and travelling on them, such attachments do not break loose. They are grabbed as aids to boarding cars by many persons every day, with perfect and merited confidence in their security. The handrail, as well as the rest of the car, was in the control and under the management and care of the company. That an accident so contrary to common experience occurred, bespeaks carelessness in the party using the appliance, and makes a prima facie case for the injured individual. Blanton v. Dold, 109 Mo. 64; Turner v. Hoar, 114 Mo. 335; Gallagher v. Illuminating Co., 72 Mo. App. 576; Suter v. Birchoff, 63 Mo. App. 157; Minister v. Railway, 53 Mo. App. 276; Hill v. Scott, 38 Mo. App. 370; Lyons v. Rosenthal, 11 Hun 46. In cases in which a handrail on a freight car pulled off under the weight of a trainman, the question of negligence was referred to the jury, though the plaintiffs apparently proved no more. It was ruled, expressly in some cases and impliedly in others, that the burden was on the defendant to acquit itself of negligence by showing the handhold had been properly fastened and regularly inspected. Braun v. Railway, 53 Iowa 595; Jones v. Railway, 22 Hun 284; Toledo, etc., Railway v. Ingraham, 77 Ill. 309; Chicago, etc., Railway Co. v. Platt, 89 Ill. 141. Those were actions by servants whose employers were under a legal obligation to use care to furnish them safe appliances to work with. The present plaintiff was not a servant nor, yet, a passenger; but as regards the use of the handrail at an unusual place, his status was intermediate between that of a bare licensee and a passenger; a status that has no distinctive legal appellation so far as we

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know. He was not exactly an invited licensee, but, perhaps, might be called appropriately a probable licensee; for he, like every one else, was expected to use the handrail as an aid to mounting to the platform and maintaining a position on it. The duty owed by the defendant to the plaintiff is like that owed by railway companies to persons who walk on depot platforms or get on cars, not with the intention of becoming passengers, nor as mere idlers or intruders; but to assist friends who are taking passage, or on some other privileged mission. A carrier is under an obligation to that class of people to use ordinary care in keeping its platform fit for their use and in regulating the movements of its trains so as not to hurt them. Doss v. Railway, 39 Mo. 27; Gillis v. Railway, 59 Pa. St. 129; Burbank v. Railway, 42 La. Ann. 1156; Palmer v. Railway, 111 N. Y. 488; Kelly v. Railway, 112 N. Y. 443.

The defendant in the present case was under an obligation to the plaintiff, as to the public generally, to have the handrail sound and secure, if that could be done by ordinary care. In providing the handrail the company tacitly agreed with anyone who had occasion to use it, in a lawful attempt to take passage on the car, to be careful that it was safe. That the tearing loose of the attachment was evidence going to prove nonperformance of the duty growing out of that implied promise, is a proposition established by the decisions we have cited some of which are undistinguishable in their material facts, and others in principle, from the present case. See, especially, Lyons v. Rosenthal, Gallagher v. Illuminating Co., Braun v. Railway, Jones v. Id., and Railway Co. v. Grant, supra.

The judgment is reversed and the cause remanded.
*Bland, P. J.*, and *Reyburn, J.*, concur.

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# WHITSON, Respondent, v. FARBER BANK, Appellant.

**St. Louis Court of Appeals, March 29, 1904.**

1. **BANKRUPTCY: Partnership: Jurisdiction.** In a proceeding to have a partnership adjudged bankrupt, a court of bankruptcy has jurisdiction in the district where one of the partners has resided or has been domiciled or has had his principal place of business for the greater portion of six months preceding the filing of the petition.

2. ———: ———: ———: **Evidence.** Copies of the adjudication and the order of the referee approving the bond of the trustee, duly authenticated under section 3135, Revised Statutes, 1899, were properly admitted in evidence, without affirmative proof that process had been served on either of the partners, though there was evidence to show that one of them had continuously resided in another State for a period antedating the inception of the bankruptcy proceeding and was therefore beyond the reach of process.

3. ———: **Intention of Bankrupt: Knowledge of Creditor.** In an action by the trustee in bankruptcy to avoid a preference, under section 60, paragraph b of the bankruptcy act of 1898, in order to recover, it is necessary to show that the bankrupt intended to give a preference to the defendant and that the defendant had reasonable cause to believe that he so intended.

4. ———: **Notice: Agent.** Notice on the part of an agent that will bind his principal is ordinarily such as is acquired during the agency and, where the preference was a chattel mortgage taken by the preferred creditor, a bank, and the business was transacted by the bank's cashier and president, the knowledge of the intended preference by one put in charge of the mortgaged property for the bank, obtained before he was employed by the bank and while acting as clerk for the bankrupt, is not imputable to the bank.

5. **PRACTICE: Peremptory Instruction.** Where issues of fact were raised by the pleadings and the evidence offered by the plaintiff was oral, it was for the jury to weigh it, and a peremptory instruction to find for plaintiff was properly refused, although no evidence was offered by the defendant upon the issue.

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6. **BANKRUPTCY: Preference: Extent of Liability.** Where a bankrupt had executed two mortgages on a stock of goods and the first mortgagee took possession and, after selling a sufficient amount of the goods to satisfy his mortgage, turned the remainder over to the second mortgagee, in a successful action by the trustee to avoid the first mortgage as a preference, the defendant was liable for the value of the entire stock of goods.

Appeal from Audrain Circuit Court.—*Hon. H. W. Johnson*, Judge.

REVERSED AND REMANDED.

*P. H. Cullen* for appellant.

(1) The papers in the bankruptcy case were inadmissible in evidence because they failed to show that the Sisk Bros. had been personally served with process and also failed to show that they appeared. And further the proof was undisputed that one of the alleged bankrupts was a resident of the State of California. Bors v. Preston, 111 U. S. 252; National Bankruptcy Law, sec. 2a, subsection 1; Brandenburg on Bankruptcy (2 Ed.), p. 21, sec. 4; In re Waukesha Water Co., 8 Am. B. R. 715; In re Laskaris, 1 Am. B. R. 480. (2) Error was committed by the court in allowing the witness Gilliland to testify to what he heard the witness Lee state. Timely objection was made and overruled. The testimony was improperly admitted for two reasons, (a) it was hearsay of the most marked type and (b) it was proving knowledge on the part of the agent before he became an agent. Scoville v. Glasner, 79 Mo. 448; McDermott v. Railroad, 73 Mo. 516; Anderson v. Valmer, 83 Mo. 406; Hamilton v. Berry, 74 Mo. 177. (3) It is the settled rule in this State that notice to an agent can effect the principal only when the notice was given or the knowledge obtained by the agent during the agency. The principal is not bound by any knowledge the agent possessed before the time he became agent of

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his principal. Richardson v. Palmer, 24 Mo. App. 493; Wheeler v. Stock Yards, 66 Mo. App. 272; Haywood v. Ins. Co., 52 Mo. 191; Bank v. Shaumburg, 38 Mo. 228; Day v. Walmsley, 33 Ind. 145; Keomly Bank v. Froman, 129 Mo. 430; Benton v. Bank, 122 Mo. 339; Johnson v. Shortridge, 93 Mo. 227; Bank v. Lovitt, 114 Mo. 519; Manhatton Brass Co. v. Webster, 37 Mo. App. 135. (4) It is well settled that the person receiving the preference must have reasonable cause to believe that a preference was intended. This cause must exist at the time, not afterwards. Bankruptcy Law, sec. 60, subdiv. b.; Gates v. Lebeauvre, 19 Mo. 27. If this preference was not void at its inception it can not be avoided because of subsequent knowledge on the part of defendant's officers. 14 Ency. of Law (2 Ed.), 269. (5) Return of goods or any part thereof must be considered in mitigation of damages, such is the clear holding of all our courts. Loyd v. Tracy, 53 Mo. App. 175; Wood v. Moffitt, 38 Mo. App. 395; Gilbert v. Peck, 43 Mo. App. 582; Spark v. Purdy, 11 Mo. 219. (6) For a full statement of the law on such a state of facts see Sutherland on Damages, where the rule with all its variations is clearly stated and the authorities cited and classified. 1 Sutherland on Dam. (Ed. 1883), sec. 238-240; 3 Sutherland on Dam. (Ed. 1883), sec. 528-537. (7) The defendant took possession under its mortgage on June 7; the petition in bankruptcy was filed August 8. The adjudication in bankruptcy was entered Sept. 26, the defendant had sold sufficient goods to pay its debt by Sept. 8, and on that date, Sept. 8, released all claim on the remainder of the goods and turned them back to Sisk Bros. Defendant turned back the goods 18 days before the adjudication in bankruptcy. It could not lawfully turn them back to any one but Sisk Bros. as the trustee had no right to them until the date of the adjudication. National Bankruptcy Law, sec. 70, subdiv. a; McFarlane Car-

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riage Co. v. Wells, 99 Mo. App. 641; In re Wells, 114 Fed. 222, Am. B. R. 75; Mueller v. Nugent, 184 U. S. 1. (8) In order to set aside an alleged preference at the suit of a trustee it must be made to appear that the debtor intended to prefer and the creditor must have reasonable cause to believe that such intention existed in the mind of the debtor. Peck Trustee v. Connell, 8 Am. B. R. 500; Babbett v. Kelley, 96 Mo. App. 534; Brandenburg on Bankruptcy (2 Ed.), sec. 16, p. 567 and sec. 19, p. 570; Collier on Bankruptcy (3 Ed.), 342.

*George Robertson* for respondent.

(1) Under the law and undisputed evidence in this case the plaintiff was entitled to a verdict and the court should have instructed the jury to return a verdict for the plaintiff. No other verdict than that which was rendered could be allowed to stand in this case. Sherman v. Luckhardt, 96 Mo. App. 320; Pepperdine v. Bank, 84 Mo. App. 234; Landis v. McDonald, 88 Mo. App. 335; Babbitt v. Kelley, 96 Mo. App. 529; In re Egbert, 98 Fed. 843; Dutcher et al. v. Wright, assignee, 94 U. S. 553; Troop v. Martin, Assignee, 13 Wall. 40; Rosenfeld v. Seigfried, 91 Mo. App. 169; Harris v. National Bank, 75 S. W. 1052; Fed. Bankruptcy Act, sec. 3, subdivisions 1 and 2; Collier on Bankruptcy, pp. 25 to 35; Bankruptcy Act, sec. 67e. and f.; Collier on Bankruptcy, 422. (2) The certified copy of the judgment of bankruptcy and the certified copies of proceedings before the referee, and of the order approving the bond of the trustee, are conclusive evidence of the vesting in the trustee of the title to the property of the bankrupts. Sec. 21 of the Act of Bankruptcy, clauses d and e; Scrubby v. Morton, 91 Mo. App. 517. Lee was agent of the bank in taking possession of the stock of goods, and the conversation of Gilliland called for with him was admissible, because the admissions of the agent in and about the business which he is transacting for

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the principal, is the admission of the principal, and because the knowledge of Lee in and about the business at the time of taking possession of the goods and making the inventory thereof is the knowledge of the bank, because he is its duly authorized agent for that purpose. Underhill on Evidence, sec. 73 a.; 1 Am. & Eng. Ency. of Law (2 Ed.), 691, et seq; 3 Am. & Eng. Ency. of Law (2 Ed.), 845, note 3; Hawk v. Applegate, 37 Mo. App. 32; Midland Lumber Co. v. Kreeger, 52 Mo. App. 418; Hill v. Bank, 86 Mo. App. 590; Fowles v. Loan Co., 86 Mo. App. 103; Rodgers v. Palmer, 102 U. S. 263; Atkison v. Elmore, 77 S. W. 492; In re Beerman (D. C.), 112 Fed. 662; Act of Bankruptcy, clause b, sec. 60.

GOODE, J.—The respondent is a trustee in bankruptcy in charge of the estate of Sisk Bros., and as such instituted this action against the appellant for the value of a stock of merchandise, formerly owned by the firm; which was composed of Robert E. and Geo. W. Sisk and engaged in the mercantile business at Farber, in Audrain county. The value of the stock was alleged to be $2,794.52.

The answer was a general denial.

On May 8, 1902, Sisk Bros. were indebted to the Farber Bank in the sum of $640, to secure which they gave a chattel mortgage on their stock of goods. The mortgage was not recorded until June 9, 1902, prior to which day, viz: June 7, the bank took possession of the property pursuant to the terms of the instrument, put George A. Lee in charge as agent of the bank and proceeded to sell goods, mostly at retail, until September 8; at which date, as enough had been sold for the proceeds to pay the bank's debt, the stock was turned over to J. D. Pitt, who held a second chattel mortgage on it to secure a debt of $970. While the stock was in the bank's possession it had realized from the goods



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sold $833.48. Pitt afterwards sold the remainder of the stock at auction to pay his debt. Sisk Bros. had been indebted to the Farber Bank since June 11, 1901, for about the amount of $640 and had given the bank a previous note and chattel mortgage to secure that debt, which were superseded by those executed May 7, 1902. On August 4, 1902, a petition in bankruptcy was filed against the partnership and it was adjudged bankrupt September 26, 1902. At the first meeting of the firm's creditors on November 17, 1902, the respondent Whitson was elected trustee, and qualified November 21st. George W. Sisk was in California when the petition in bankruptcy was filed and service was had on Robert E. Sisk, the other member of the firm. George A. Lee, who was put in charge of the stock by the bank when it took possession, had been previously employed by Sisk Bros. as a clerk. A point is made about this on the appeal in connection with certain testimony and instructions to be adverted to later.

The basis of this action for the value of the goods is that the mortgage was executed by Sisk Bros. when they were insolvent, for the purpose of giving a preference to the bank, was accepted by the bank with knowledge of that purpose and of the insolvency of the mortgagors, and possession of the mortgaged property delivered to the bank under the same circumstances. As the mortgage was executed and the goods were taken by the bank less than four months prior to the petition in bankruptcy, the preference given by those acts would be contrary to the bankrupt act and voidable by the trustee, if the intention of the mortgagors to give a preference was known to the bank, or if it had good cause to believe that was their purpose.

Complaints are preferred against instructions given by the court, which will be noticed below.

The trustee had judgment and the bank appealed.

The appellant complains of the admission in evi-

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dence of certified copies of the adjudication that Sisk Bros. were bankrupts and of the order of the referee in bankruptcy approving the bond of Whitson as trustee. Those documents are said to have been erroneously admitted for the reason that no service of process on either of the Sisk brothers was affirmatively shown and one of them was proven to have been continuously in California for a long period antedating the inception of the bankruptcy proceeding, and, therefore beyond the reach of the subpœna of the United States district court for the Eastern District of Missouri, wherein the proceeding was instituted. The residence of Geo. W. Sisk was immaterial, as the other partner, R. E. Sisk, resided within the federal district. The Bankruptcy Act of 1898 declares in section 5, that the court of bankruptcy which has jurisdiction of one member of a partnership may have jurisdiction of all the partners and of the partnership and individual property. It has been decided that a proceeding to have a partnership adjudged a bankrupt may be brought in any district where one of the partners has resided, been domiciled, or had his principal place of business long enough to support the jurisdiction of the court of that district, namely; for the larger portion of six months preceding the filing of the petition. In re Blair, 3 Am. B. R. 588, construing sec. 2, Bankruptcy Act, 1898.

We overrule, too, the objection that it was necessary to show affirmatively the partners had been served with subpoenas or had appeared before they were adjudged bankrupts, in order to make the exemplifications of the record of the federal proceedings competent evidence. The same contention was passed on by this court and settled against the position of the appellant in Rosenfeld v. Siegfried, 91 Mo. App. 169. Those certified documents were introduced at the trial of this case to prove a fact collateral to the main issues, and it was unnecessary to support them by establishing the juris-

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diction of the federal court over the bankrupts, as possibly would have been necessary in a suit or proceeding to vacate the judgment. The ruling in the Rosenfeld case was based on section 3135 of the Revised Statutes, 1899, which declares that the records and judicial proceedings of any court of the United States or of any State, attested by the clerk thereof, with the seal of the court annexed, and certified by the judge of the court, shall have such faith and credit given to them in this State as they would have at the place whence said records come. We call attention also to paragraphs *d* and *e* of section 21 of the bankruptcy act as bearing on the question of the admissibility of copies of federal records in bankruptcy cases.

The instructions given are open to just criticism for failing to present the essential issues of fact that arose for the jury's decision and to correctly state the law applicable to them. The important controversies of fact were whether Sisk Bros. were insolvent when the bank took possession of the merchandise on June 7, and whether any officer of the bank, or agent acting for it in the transaction, had reason to believe the intention of said debtors was to give the bank preference over other creditors. Bankruptcy Act, sec. 60. That the bank took possession of the goods and that the mortgage was executed within four months of the filing of the petition in bankruptcy was undenied; and it was undeniable that, if allowed to enforce the mortgage, the bank would obtain a greater percentage of its claim than the other creditors of Sisk Bros. would receive on their claims. It will thus be seen that the issues of fact were few and the law pertinent to them plain. Without reciting all the instructions at length, for they are numerous and prolix, we will point out the errors they contain. One erroneous theory asserted in them consists in making the trustee's right to a verdict depend on a finding by the jury that the bank

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intended to obtain a preference when it took the goods, instead of on a finding that Sisk Bros. intended to award the bank a preference and that the bank's officers or agent had reasonable cause to believe such was the intention of the mortgagors. In illustration of that error we will copy an instruction given at the plaintiff's instance:

"The court instructs the jury that if you believe from the evidence that on June 7, 1902, said Sisk Brothers were insolvent and the fact was known to the defendant's cashier, agent or president, or if either of them had reasonable cause to believe they were insolvent and took possession of said stock knowing or having cause to know and intended that the bank was getting a preference, then you will find for the plaintiff."

Another instruction told the jury that if the bank took possession of the merchandise in order to get a preference and such intent was known to either said Sisk Bros. *or if said Sisk Bros. intended to prefer said bank,* the verdict should be for the plaintiff, etc. The meaning of the first clause of that charge is, that if the intention regarding a preference was entertained by the bank and known to one of the Sisk Bros. the preference was void; whereas the law is that the intention to prefer must have been entertained by Sisk Bros. and the bank have had reason to believe they entertained it. The instruction practically reversed the force of paragraph *b* of section 60 of the bankrupt act, which will be quoted below. It was faulty, too, in saying that if Sisk Bros. intended to prefer the bank, the verdict should be for the plaintiff, without requiring the jury to find the bank had cause to believe Sisk Bros. so intended; which is the essence of a preference voidable as having transpired within four months of the petition in bankruptcy.

As we have said above, when the bank took possession of the merchandise it left Lee, who had been a

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clerk of Sisk Bros., in charge. The court allowed a witness to testify as to statements Lee made to him when they were invoicing the stock, concerning the amount of indebtedness of Sisk Bros., and an exception was saved to that ruling. The purpose of the testimony was to prove Lee knew Sisk Bros. were insolvent when the bank took possession and affect the bank by his knowledge, though whatever knowledge he had on the subject, was acquired prior to his employment by the bank and while he was still working for Sisk Bros. The court directed a verdict for the plaintiff if the jury found Lee had knowledge that Sisk Bros. were insolvent, even if he obtained that knowledge prior to June 7th, when the bank hired him. To show this was done, we will present an instruction given at the instance of the plaintiff, which was erroneous, not only in adopting that theory, but in again propounding the proposition that an intention regarding a preference cherished by the bank, or its agent, would justify a verdict for the trustee, and in omitting to declare that the officers of the bank must have had reasonable cause to believe the mortgagors intended to prefer:

"The court instructs the jury that the defendant being a corporation can act only by and through its agents and officers and that notice to its agents or officers in and about the business in question is notice to the defendant and that the defendant is bound by the acts of its agents and officers and if you find that at the time said bank took possession of said stock of goods, June 7, 1902, or at any time prior thereto, the said Lee, who took possession of said stock of goods and sold the same for the defendant, or if the cashier at such time, or the president of the defendant at that time knew, or that either of them had the means of knowing that the said Sisk Brothers were insolvent, and that the intent of such agent or agents in taking possession of said stock of goods was that the bank would get a preference over

the other creditors and it was the intent of the Sisk Brothers in making said mortgage or delivering said stock over to the bank to prefer said bank over any of their other creditors, then the plaintiff is entitled to recover and you will find for the plaintiff."

Lee was not such an agent of the bank as is meant by the bankrupt act in providing that if an agent of a preferred creditor has cause to believe a preference was intended, the transaction contravenes the law. The language of the act is: "If a bankrupt shall have given a preference and the person receiving it or to be benefited thereby, *or his agent acting therein,* shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee and he may recover the property or its value from such person." Sec. 60, paragraph *b*. Lee did not act as agent of the bank either in procuring the mortgage, or in taking possession of the goods. Those affairs were transacted by the bank's cashier and its president, and Lee's connection with the matter began when he was entrusted with the stock after the bank had taken it. Unquestionably this fact and the relation he thereafter stood in to the bank as custodian of the goods could not operate to render the preference a violation of the bankrupt law, because he knew, or had reason to believe, while he was working for Sisk Bros., that they were insolvent. To so hold would be to make his knowledge sufficient cause for avoiding transactions with the bank (giving it the mortgage and the stock of goods) that occurred before he represented it in any way. He was not the bank's agent when it took the goods and knowledge he then possessed could not render the transaction fraudulent and voidable because the bank subsequently employed him. What the bankrupt law intends to prevent is the acquiring of a preference by some creditor of an insolvent debtor who had reason to believe the debtor was insolvent when the preference

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was given. Plainly the bank had no reason to believe Sisk Bros. were insolvent when the merchandise was taken under the mortgage, merely because Lee, who afterwards became its employee, then knew they were insolvent. Knowledge or notice on the part of a special agent that will bind his principal is ordinarily such as is given or acquired during the agency. Some cases seem to affect the principal with the agent's knowledge acquired so short a time before he was employed that he must have remembered it. Story states the rule thus:

"Upon a similar ground, notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from, or is at the time connected with, the subject-matter of his agency; for, upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal; and if he has not, still the principal, having intrusted the agent with the particular business, the other party has a right to deem his acts and knowledge obligatory upon the principal; otherwise, the neglect of the agent, whether designed or undesigned, might operate most injuriously to the rights and interests of such party. But, unless notice of the facts comes to the agent while he is concerned for the principal, and in the course of the very transaction, or so near before it that the agent must be presumed to recollect it, it is not notice thereof to the principal, for otherwise the agent might have forgotten it; and then the principal would be affected by his want of memory at the time of undertaking the agency. Notice, therefore, before the agency is begun or after it has terminated, will not, ordinarily affect the principal." Agency (2 Ed.) sec. 140; Anderson v. Volmer, 83 Mo. 403; Wheeler v. Stock Yards, 66 Mo. App. 272. This matter is discussed and cases reviewed in Hayward v. Ins. Co., 52 Mo. 181. Suffice to say that in the present controversy Lee's knowledge of the in-

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solvency of Sisk Bros. could not render the surrender of the merchandise a voidable preference, because he had no connection with the bank when it happened.

That error occurred during the trial of this cause is scarcely denied by the respondent's counsel, but he insists the evidence to show Sisk Bros. were insolvent when they delivered possession of the merchandise, that they intended to give a preference by that act, and that the bank knew their condition and intention, is conclusive; and, hence, the judgment plainly appears to be for the right party and ought to be affirmed. Those questions of fact were denied in the answer and contested by the appellant. All the testimony introduced to establish them was oral and we do not understand the law to be that the trial court would have been justified in giving a peremptory instruction to the jury to return a verdict for the respondent. But unless such an instruction was called for, we can not pass over the erroneous rulings made at the trial. When issues of fact are raised by the pleadings and the evidence offered by the plaintiff to sustain the allegations of his petition, is of an oral instead of a documentary character, the jury must weigh it and decide the issues, and of course, must do so in the light of correct instructions regarding the law. This has been declared by the Supreme and appellate courts of this State many times. In Seehorn v. Bank, 148 Mo. l. c. 265, it was said, in regard to the refusal of a peremptory instruction which the plaintiff had asked on the theory that the evidence to support its case was uncontradicted: "In the second place where allegations in the petition are denied by the answer, and evidence is introduced by the plaintiff to sustain the issues upon his part, the defendant is entitled to have the jury pass upon the evidence though he offers no evidence at all." We refer also to Gannon v. Gas Light Co., 145 Mo. 502, and Hugumin v. Hines, 97 Mo. App. l. c. 355, wherein the law is declared

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as we have stated it, and to other decisions of the appellate courts of this State cited in the opinions in those cases.

Appellant contends that if liable at all, it was only liable for the value of the goods sold while the stock was in its possession, instead of for the value of the entire stock, and that Pitts must answer for the remnant of the stock that was turned over to him. This proposition came before a federal court for decision in North v. House, 18 Fed. Cas. 328; (Case No. 10310). Rawlings had turned over a stock of merchandise to House in a preferential way and was shortly afterwards adjudged a bankrupt. House sold the goods and besides paying what Rawlings owed him, paid out of the proceeds of the stock about $9,000 to other creditors of Rawlings. The assignee or trustee in bankruptcy sued House for the value of the stock. House claimed to be entitled to a credit for the amount he had paid to other creditors, but the point was ruled against him on the ground that the payments themselves were in fraud of the bankrupt act and gave an undue preference to those creditors. The same reason obtains for holding the Farber Bank responsible for the goods turned over to Pitts. Pitts was thereby enabled to obtain a preference in contravention of the bankrupt law.

The judgment is reversed and the cause remanded.
*Bland*, *P. J.*, and *Reyburn*, *J.*, concur.

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## DIX, Appellant, v. LOHMAN, Respondent.

**St. Louis Court of Appeals, March 29, 1904.**

**EJECTMENT: Mortgages: Redemption: Rents and Profits.** The purchaser under a mortgage foreclosure sale sued in ejectment for possession and the answer prayed that the mortgagor might redeem from the mortgage on account of irregularities in the sale. The judgment was for plaintiff for possession, but provided that the mortgagor might redeem, by a given date, by payment of the debt secured by the mortgage, and that, in case she failed to do so, execution would then issue for possession. *Held*, in a suit by the mortgagor for the rents, she was entitled to the rents and profits up to the expiration of the time fixed for redemption, although she did not redeem. *Held* further, under a stipulation entered into between the parties, pending the ejectment suit, whereby they agreed that the rents should be paid to the successful party, the mortgagor was entitled to the rents for that period as the successful party.

Appeal from Warren Circuit Court.—*Hon. E. M. Hughes*, Judge.

REVERSED AND REMANDED (*with directions*).

*J. W. Delventhal* and *C. W. Wilson* for appellant.

(1) Upon the death of Walter Dix his widow was entitled to remain in possession and to receive the rents of the home place until dower was assigned. R. S. 1899, sec. 2954; Carey v. West, 139 Mo. 174; Holmes v. Kring, 93 Mo. 452. (2) Whatever may have been the rights of Mr. Wild, concerning the rents after the sale under deed of trust, given by Walter Dix and wife in his lifetime, he is bound by the decree of the court in the ejectment suit of Wild v. Dix. He can not now be heard to claim any more than was allowed him in that decree. (3) The decree of the court fixes his right

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to possession to begin on March 1, 1901. Under the decree he was not and is not entitled to rents for the year 1900. The money at issue is the rent of the farm for the crop year expiring on March 1, 1901, or at the date his right to possession is fixed by the decree in Wild v. Dix. Crispen v. Hannann, 50 Mo. 416; Bierman v. Crecelies, 135 Mo. 386; McDonald v. Matney, 82 Mo. 363. (4) As there is no conflict of evidence the court should either set aside the judgment of the lower court and enter up judgment in favor of plaintiff, or else reverse and remand with directions to enter judgment in her favor, for the amount in Lohmann's hands, with 6 per cent interest from the date of filing suit. R. S. 1899, sec. 866; State v. Weaver, 93 Mo. 682; Land Co. v. Bretz, 125 Mo. 422.

*Peers & Peers* for respondent.

STATEMENT.

The evidence shows that the plaintiff is the widow of Walter Dix who died in the month of January, 1899; that prior to and at the date of his death, Walter Dix owned a five-hundred acre farm in Warren county, Missouri, upon which he resided with his family. After his death neither dower nor homestead was set off to plaintiff from the farm. However, she continued to reside upon the farm with her children, as was her right, until March 1, 1901, when, in obedience to a judgment of the circuit court hereinafter set out, she delivered the possession of the premises to Louis Wild. On January 13, 1895, Walter Dix and wife made a deed of trust on the farm to Henry Bohnemeyer, trustee, to secure Walter Dix's note of the same date for the sum of $4300, payable to Ida Meyer, due one year after date with eight per cent interest. The note was not paid and the trustee advertised and sold the farm in

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bulk to satisfy the debt. At the trustee's sale Louis Wild became the purchaser of the entire tract and after receiving the trustee's deed brought suit in ejectment against Mrs. Dix (plaintiff herein) for the recovery of the possession of the land. Mrs. Dix appeared to the suit and filed an answer in which she alleged that the trustee had advertised the land at an inopportune time and season of the year to secure bidders; that he had acted as special agent of Ida Meyer, the beneficiary, and had wrongfully sacrificed the land by selling the entire tract in bulk when he should, as requested to do, have sold it in parcels, into which the land could have been conveniently divided, and alleged that on account of these irregularities and wrongs plaintiff should be allowed to redeem. The court to whom the issues were submitted, found in favor of Mrs. Dix's contention and rendered the following judgment:

"Louis Wild, plaintiff, v. Elizabeth Dix, defendant.

EJECTMENT.

"Now on this day the above cause comes on for trial the plaintiff appearing by C. E. Peers, his attorney, and the defendant coming by H. W. Johnson, her attorney, and a jury being waived the matter and things on the pleadings and the evidence being by the court heard and fully understood, it is ordered, adjudged and decreed by the court, that judgment be and same is rendered by the court in favor of plaintiff, for the possession of the premises described in the petition, together with one cent damages, and fifty dollars a month rents and profits from the first day of March, 1901, and it is further ordered by the court that if the defendants pay to the clerk of this court for the use of the holder of the Ida Meyer note, the debt and interest due on said note up to the first day of March, 1901, also all taxes paid on the land by the plaintiff, together with six per cent interest on same to the first

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day of March, 1901, also all costs with six per cent interest thereon up to the first day of March, 1901, then the case shall stand dismissed, but a failure to pay any or all of the above amounts by the first day of March, 1901, execution shall issue for the possession of the property in the petition described, together with the damages and monthly rents and profits, as herein set out."

As is seen by the judgment and the decree, as herein set out, the circuit court adjudged that Elizabeth Dix was entitled to redeem the land upon payment of the debt and interest secured by the deed of trust and cost of sale, and gave her until the first day of March, 1901, in which to redeem.

It further adjudged that if she failed to redeem by March 1, 1901, the said Louis Wild was awarded judgment of possession on March 1, 1901, with one cent damages, and with monthly rents and profits from March 1, 1901, at the rate of $50 per month. By the decree of the court Elizabeth Dix was entitled to remain in possession until March 1, 1901.

Pending the ejectment suit the parties entered into the following stipulation:

"Whereas, Louis Wild, as plaintiff, has begun suit in the Warren circuit court at the April term, 1900, in ejectment against Elizabeth Dix to recover possession of the following described real estate situated in said county, to-wit (here follows a minute description of the lands): All of said lands being in the possession of said Elizabeth Dix; and, whereas, on account of said litigation renters refuse to lease said lands for the crop year, 1900, by reason of the uncertainity of and to whom the rent is payable; now in order that said lands may bring some income during the litigation and to settle the question as to the power of some one to rent said lands and to collect the rents, it is agreed by and between the parties hereto acting by their respective attorneys, that

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Herman Lohman, Esq., of Camp Branch township, Warren county, Missouri, be and he is hereby appointed trustee of all of said lands for the crop year, 1900, and is hereby authorized to make contract, receive and collect all rents, whether in money or crops and to return, hold and keep the money arising therefrom until the final determination of this litigation, at which time, he, the said Lohman, is to account for and turn over to the successful party in said litigation the entire proceeds, less a reasonable compensation to said trustee for his services in renting, looking after and managing said land, and it is further understood that this agreement shall not be used by either party in said suit; nor shall it be considered in any way or manner whatever as recognizing the rights or affecting the interests of either party to the litigation herein for the possession of said land, but being understood simply as an agreement to the end that the property may be rented pending the litigation and bring some revenue to the successful party during that time, and it is further understood and agreed that possession of said lands shall be delivered to the successful party in said litigation, at the final determination thereof through the tenants and parties hereto without the necessity of issuing execution or other legal process or means.

"Witness our hands and seals this twelfth day of March, 1900."

Mrs. Dix was unable to redeem and on March 1, 1901, surrendered possession of the farm to Mr. Wild. The defendant Lohman rented the farm, as agreed in the stipulation, for the year 1900, and realized over and above his expenses and a reasonable commission for his services, the net sum of $326.12, as the rent of the farm. The suit was to recover this sum. The court to whom the issues were submitted, found in favor of the defendant and rendered judgment on the theory that Wild and not plaintiff was entitled to the rent for

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the year 1900. To reverse the judgment, plaintiff appealed.

BLAND, P. J. (after stating the facts as above.)—The right to the rent for 1900 is controlled by the judgment in the ejectment suit; neither party having appealed therefrom, both are bound thereby. The contention of Mrs. Dix in that suit was, that the foreclosure sale by the trustee was so tainted by misconduct and partiality on his part as not to deprive her of her right to pay the debt and have the deed of trust satisfied. The court found in favor of her contention and gave her time in which to redeem and postpone Wild's right to possession and suspend foreclosure by the sale under the deed of trust until the expiration of the redemption period. Wild was not given the right to the rents and profits of the premises until after March 1, 1901, and not then if the plaintiff should redeem by that date. Under the judgment, Wild had neither an indefeasible title to the lands, the right to their possession, nor the right to the rents and profits of the premises for the year 1900. As to the rents and profits, they were as much the subject of litigation in the ejectment suit as was the right to possession of the premises. Mrs. Dix was the successful party in respect to the rents for the year 1900, and under the judgment, as well as under the stipulation signed by her and Wild, March 12, 1900, she is entitled to these rents. The judgment is, therefore, reversed and the cause remanded with directions to the circuit court to enter judgment for the plaintiff for $326.12, with six per cent interest thereon from the date plaintiff began this suit. *Reyburn* and *Goode, JJ.*, concur.

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# MALIN, Respondent, v. MERCANTILE TOWN MUTUAL INSURANCE COMPANY, Appellant.

**St. Louis Court of Appeals, March 29, 1904.**

1. **INSURANCE: Act of Insured's Son.** In an action on a policy for fire insurance, an allegation of the answer that the son of the plaintiff filled a stove in the building destroyed, with combustible materials, and thus recklessly caused the loss, stated no defense and was properly stricken out, there being no allegation that plaintiff ordered such act of his son or had notice of it.

2. ———: **Increase of Risk.** Where the insured discovered a joist which was against a flue, to be burning, extinguished the fire, sawed off the charred end of the joist and removed some loose boards which were in contact with the flue, he did not thereby increase the risk, so as to require notice to the insured of the change, or avoid the policy under a clause of the policy which made it void if the hazard should be increased.

3. **PRACTICE: Evidence: Application for Continuance.** In an action on a fire insurance policy, the defendant insurance company was granted two continuances, upon applications sworn to by the agent of defendant, on account of absent witnesses, whose alleged testimony was set out in the applications. The first application stated that two witnesses, named, saw plaintiff set fire to the property, the loss of which was the basis of the suit. The second application stated that two other witnesses were permitted by plaintiff to remove goods from the building on the night of the fire. The depositions of two witnesses, not named in either application, were read at the trial, who testified to the facts set up in the first application, but swore they did not know the witnesses named therein. No one testified to the facts stated in the second application. *Held,* that both applications were admissible when offered in evidence by plaintiff as circumstantial evidence tending to show want of good faith in the defense that plaintiff had caused the fire, and to affect the credibility of the two witnesses whose depositions were read.

4. **INSURANCE: Books of Account.** The purpose of a stipulation in a policy on a stock of goods, requiring the insured to keep a set of books showing a complete record of all transactions, etc., is to furnish data by which to ascertain the amount of goods



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on hand at the time of the fire and estimate with reasonable correctness the amount of the loss; and when this is done, a literal compliance with such a provision is not necessary.

5. ———: **Three-Fourths Clause.** It is competent for fire insurance companies to fix the measure of damages in case of loss by a three-fourths value clause.

6. ———: ———: **Harmless Error.** But in an action on a policy, an instruction to the jury which ignores the three-fourths value clause, was harmless error, where the evidence shewed the total amount of insurance was less than three-fourths of the value of the property destroyed.

7. **PRACTICE: Remarks of Counsel to Jury.** Under the circumstances of the case, which are examined, impassioned comment of counsel for plaintiff in his argument to the jury, upon the conduct of the defense, held not unwarranted nor prejudicial.

Appeal from Greene Circuit Court.—*Hon. J. T. Neville*, Judge.

AFFIRMED.

*G. W. Watson, Barbour & McDavid* and *Fyke Bros., Snider & Richardson* for defendant.

(1) The court committed error in sustaining plaintiff's motion to strike out that part of defendant's answer which set up as a defense that the fire which occasioned the loss sued for was the result of gross neglect or intent on the part of plaintiff's son and agent, in charge of and associated with plaintiff in the store business. LaForce v. Ins. Co., 43 Mo. App. 518. (2) The applications for continuances filed by the defendant, and the affidavits connected therewith were wholly irrelevant to any issue involved in the cause. It is apparent that they were offered in evidence by plaintiffs and put before the jury for the purpose of creating a prejudice against the defendant in the minds of the jurors, and the trial court committed error to defendant's prejudice in overruling defendant's objection to their admission in evidence. Alcorn v. Railway, 108

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Mo. 90; Gubernator v. Rettalack, 86 Mo. App. 184; Bank v. Scalzo, 127 Mo. 185; Connor v. Black, 110 Mo. 136; Pryor v. Railway, 85 Mo. App. 367; Railway v. Oritz, 158 U. S. 334, 39 Law Ed. 1006; Bindbeutel v. Railway, 43 Mo. App. 468; Suttle v. Aloe, 39 Mo. App. 38; Clerk v. Fairley, 30 Mo. App. 335; Walton v. Railway, 40 Mo. App. 544; Baird v. Am. Car Co., 63 Mo. App. 382; McDermott v. Judy's Admr., 67 Mo. App. 647. (3) The policy sued on contained a three-fourths value clause, or condition limiting the defendant's liability to a pro rata proportion of three-fourths of the value of the property destroyed. The instruction given by the court, over defendant's objection, disregards this provision of the contract, which is a valid and binding condition, and instructs the jury that they should find for plaintiff for the amount of defendant's proportion of the full amount of the loss. This was error. Millis v. Ins. Co., 95 Mo. App. 211; Dolan v. Ins. Co., 88 Mo. App. 666; Roberts v. Ins. Co., 94 Mo. App. 142. (4) The fact of the previous fire in plaintiff's store and its damage to, and the changes in consequence thereof in and about the flue in the store building was a circumstance material to and a change in the risk insured. It was plaintiff's duty immediately thereafter to have notified the defendant thereof, and defendant's instruction to that effect should have been given. (5) The condition of the policy requiring and by which insured agreed to keep a set of books, clearly and plainly presenting a complete record of business transacted, including all purchases and sales, and to take a complete itemized inventory as specified, is a valid and binding condition. It is admitted its conditions had not been complied with, so that, defendant's first instruction, refused, should have been given. Gibson v. Ins. Co., 82 Mo. App. 520; Ins. Co. v. Monger & H., 74 S. W. 702; R. & M. v. Ins. Co., 48 S. W. 550; Fire Ass'n v. Calhoun, 67 S. W. 153; Ins. Co. v. Wilkerson, 13 S. W. 1103; Collin v. Ins. Co,

1 Sum. 434; Wood on Insurance, sec. 440; O'Brien v. Ins. Co., 63 N. Y. 111. (6) The remarks of plaintiff's counsel, taken by the court stenographer, set out in the bill of exceptions, objected to by defendant, and called to the court's attention, but not rebuked, constituted an unwarranted and unsupported attack on defendant, made for the purpose of prejudicing the jury, and is reversible error. Killoren v. Meehan et al., 68 Mo. App. 212; Gibson v. Zeitig, 24 Mo. App. 65; McDonald & Co. v. Cash et al., 45 Mo. App. 66; Nichols Shepherd Co. v. Metzger, 43 Mo. App. 618; Norton v. Railway, 40 Mo. App. 647.

*T. J. Delaney* for respondent.

(1) The court did not commit error in sustaining plaintiff's motion to strike out that part of defendant's answer which set up as a defense that the fire was the result of gross neglect on the part of plaintiff's son and agent. It is not charged that plaintiff was a party thereto or that the occurrence was ever brought to his knowledge. Ins. Co. v. Glasgow, 8 Mo. 713; McGammon v. Ins. Co., 171 Mo. 143; Wertheimer-Swarts v. U. S. Casualty Co., 172 Mo. 135. The act complained of in no wise contributed to the loss. Organ v. Ins. Co., 3 Mo. App. 576. (2) The several applications for continuances were properly admissible as admissions by defendant. An examination of these affidavits show that they afford a basis for legitimate inferences of fact by the jury contrary to the defense made in this case. Besides, this testimony is admissible as affecting the credit and weight to be given to the testimony of the witnesses Barr and Bacon. Bogie v. Nolan, 96 Mo. 85; Padley v. Catterlin, 64 Mo. App. 629; Gubernator v. Rettalack, 86 Mo. App. 189. (3) The failure of the court to limit the plaintiff's right of recovery to a pro rata proportion of three-fourths of the value of the property destroyed, if error, was not prejudicial error.

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Millis v. Ins. Co., 95 Mo. App. 218. (6) The previous fire was a risk against which defendant insured, and the mere occurrence of such fire can not in reason or law avoid the policy. The policy does not provide for any notice. The only provision in the policy bearing on this point is this: "This entire policy shall be void if the hazard be increased by any means within the control or knowledge of the insured." Whether or not the hazard was increased by the small blaze, or by the change in removing the joist from contact with the flue was a question of fact. This question was fully and fairly submitted to the jury. Dolan v. Town Mutual, 88 Mo. App. 666; Kern v. Ins. Co., 40 Mo. 19; Ritter v. Ins. Co., 40 Mo. 40; 1 Wood on Insurance (2 Ed.), sec. 241. Even if notice were required by terms of policy the question would still be one of fact whether change increased the risk. 1 Wood on Insurance (2 Ed.), sec. 250. And if the fire and consequent repairs or change did not materially increase the risk, such fire need not only not be reported but it might have been purposely concealed without avoiding the policy. 1 Wood on Insurance (2 Ed.), sec. 213; Baldwin v. Ins. Co., 56 Mo. 151. (7) The provision requiring the taking of an inventory and keeping a record of purchases and sales, cash and credit was fully complied with. Burnett v. Ins. Co., 68 Mo. App. 343.

STATEMENT.

On January 13, 1902, plaintiff was a retail dealer in general merchandise at Denlow, Douglas county, Missouri. On that day, defendant, the Mercantile Town Mutual Fire Insurance Company, organized under the laws of the State of Missouri, for an agreed premium paid in cash, issued its policy of insurance to plaintiff insuring him against loss or damage by fire for one year as follows: Two hundred dollars on his two-story frame

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building occupied as a retail store; one hundred and fifty dollars on store furniture and fixtures, including show cases and iron safe; fifteen hundred dollars on stock of merchandise while contained in the store. The policy contained the following stipulations:

"*Three-Fourths Value Clause*—It is part of the consideration of this policy, and the basis upon which the rate or premium is fixed, that in the event of loss this company shall not be liable for a greater amount than three-fourths of the actual cash value of the property covered by this policy at the time of such loss, and in case of other insurance, whether policies are concurrent or not, then for only its pro rata proportion of such three-fourths.

"*Inventory and Iron Safe Clause*—It is expressly warranted by the assured: first, that the assured shall take a complete itemized inventory of the stock hereby covered at least once a year during the life of this policy, and unless such inventory has been taken within twelve months prior to the date of this policy, the same shall be taken within thirty days after the date of this policy, or this policy shall be null and void from such date.

"Second—The assured shall keep a set of books which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit, from date of inventory provided for in first section of this clause, and during the continuance of this policy . . . and in the event the insured fails to so keep said books and inventories this policy shall be null and void. . . .

"This entire policy shall be void if the hazard be increased by any means within the control or knowledge of the insured."

On February 20, 1902, the store building and its contents, except about one hundred and fifty dollars worth of goods, were destroyed by fire. Plaintiff gave

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notice to the company of the fire and made out and delivered to it timely proofs of loss. The defendant company denied all liability on the policy. This suit was brought on the policy to recover the loss.

The petition is in the ordinary form.

The answer is as follows:

"The defendant, for amended answer to the petition of plaintiff, admits that it is a corporation organized under the laws of the State of Missouri, and alleges that it is organized, incorporated and doing business under and by virtue of an act of the Legislature of the State of Missouri, relating to town mutual insurance companies, and is entitled to the benefits and privileges, and subject to the provisions of such act.

"Defendant admits that on the thirteenth day of January, 1902, it made its policy of insurance sued on.

"Further answering defendant alleges that said policy was issued upon a written and printed application therefor, made and signed by M. Malin, wherein it was agreed and warranted that if the conditions and circumstances were changed or risk increased during the term of said policy said insured should notify the company immediately of the same. Otherwise said policy to be void. Defendant alleges that after said policy was issued and before the fire mentioned in the petition and to-wit, on the — day of January, 1902, a fire occurred in said building which was originated through the flue thereof, whereby said building was slightly damaged; that after the fire the said insured caused certain changes to be made in said building which weakened the flue and increased the risk of fire in said building; that it was the duty of plaintiff to have notified this defendant of said fire and have informed defendant of the changes made in said building which increased the said risk as aforesaid; but notwithstanding it was the duty of plaintiff to have so notified defendant, plaintiff never did at any time previous to the

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fire mentioned in the petition, give defendant any notice of said first fire or of said changes of said building, by reason whereof defendant says plaintiff is not entitled to recover.

"Further answering, defendant alleges that after said policy was issued, one C. P. Malin, the son of plaintiff, was in charge of said store as plaintiff's agent and employee. That on the evening prior to the fire mentioned in the policy, he built in the stove of said store, which was connected with the flue herein referred to, a fire composed of combustible timbers, which was calculated to increase the danger of fire to said building; that when the attention of said C. P. Malin was called to the fact that such fire was calculated to cause said building and all the goods to be burned, he stated, 'I don't care, let her go to hell.' That said fire was caused by the reckless act of said C. P. Malin. That by said act the risk of fire to said building and property was greatly increased and the fire mentioned in the petition was caused by the conduct of said C. P. Malin and by the defective condition of the flue herein referred to, by reason whereof defendant says plaintiff is not entitled to recover.

"Further answering the defendant alleges it is provided in said application and policy that the applicant shall take a complete itemized inventory of any stock of goods insured, at least once a year during the life of the policy, and unless such inventory has been taken within twelve months prior to the date of the policy, the same shall be taken within thirty days after the date of the policy or the policy shall be null and void from such date. The applicant shall keep a set of books which shall clearly and plainly present a complete record of all business transacted, including all purchases, sales and shipments both for cash and credit from the date of inventory provided in the first policy. The applicant shall keep such books and inventories and

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also the last preceding inventory, if such has been taken, securely locked in a fireproof safe at night and at all times when the building mentioned in the policy is not actually open for business, or failing in this, the applicant shall keep such books and inventories in some place not exposed to a fire which would destroy the aforesaid building, and if the affiant, or applicant fails to do so, said policy shall be null and void.

"Defendant alleges that plaintiff failed to comply with said conditions in said policy in this, that it did not take and preserve an inventory or inventories as required by said policy; that it did not keep a set of books, which clearly and plainly presented a record of all business transacted, including all purchases, sales and shipments, both for cash and credit, as required by said policy, and did not keep such books and inventories in a fireproof safe at night, or when said building was not actually open for business, or in some place not exposed to a fire, which would destroy said building. That the fire mentioned in the petition occurred at a time when said store was not open for business and in the nighttime, by reason whereof defendant says plaintiff is not entitled to recover.

"Further answering, defendant alleges that it was the duty of plaintiff to have used every reasonable effort at and during the progress of said fire to have prevented the destruction of said goods from fire and to have saved as many of said goods as possible and to have preserved them after the fire. Defendant alleges that at the time of said fire, plaintiff, by the exercise of reasonable diligence might, and could have saved a large quantity of said goods, but that he recklessly and willfully failed to do so and knowingly permitted other people to enter said store while said fire was in progress and take and remove therefrom a large quantity of said goods and keep and retain same for their own, by reason whereof plaintiff is not entitled to recover.

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"Further answering defendant denies each and every allegation, matter, fact and thing in the petition alleged not herein expressly admitted and having fully answered asks to go hence with its costs."

The clause of the answer, in respect to the actions and conduct of C. P. Malin, was, on motion of plaintiff, stricken out, whereupon the defendant amended its answer by adding the following clause:

"Further answering defendant alleges that the fire mentioned in the petition, which damaged said property, was caused by the willful and intentional act of the plaintiff, for the purpose of destroying said property and of defrauding this defendant."

The new matter in the answer was put at issue by a reply.

Plaintiff offered evidence showing a total destruction by fire of the building and all its contents, except about one hundred and fifty dollars worth of goods, on the night of February 20, 1902. That the building was worth six hundred dollars, and fixtures and show cases about three hundred and seventy-five dollars and the merchandise in the building at the time of the fire from fifty-two to fifty-three hundred dollars. At the time of the fire plaintiff had other insurance of twenty-five hundred dollars on the house and stock of merchandise which has been paid. In August, 1902, plaintiff took an inventory of his stock, which was produced at the trial, showing that $5,395.03 worth of goods and $375 worth of furniture and show cases were then in the store. He also produced at the trial, bills and invoices of all goods he had purchased while in business at Denlow, with the exception of forty or fifty dollars worth of miscellaneous articles purchased for cash from other retail stores. He had no fireproof safe but he testified, that the agent who took his application for the insurance knew at the time the application was made that he had no safe. His books of account and cash sales were

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taken to his residence every evening when he closed the store and kept there over night and were at his residence on the night of the fire and were produced at the trial.

Plaintiff seems to be an illiterate man and unacquainted with approved methods of keeping books of account. His account of cash sales, he testified, was kept in the following manner: each morning on opening the store he would count the cash he put in the money drawer for change and drop in a ticket of the amount; at night when he closed the store he would empty the drawer of the cash and ticket, take them to his residence, count the cash and from the total deduct the amount shown by the ticket to have been deposited in the morning and enter the remainder in his cash book as the amount of cash sales for the day. No account was kept of the articles sold, but plaintiff testified he sold on an average profit of twenty per cent, and was making some money in the business.

The chimney or flue in the store was one brick in thickness below the roof. An 8x2 joist butted against the flue about two feet above the point where the stovepipe entered the flue. A day or two after the policy was issued this joist was discovered to be charred and was burning. The fire was extinguished by a couple of buckets of water, and next day plaintiff employed a man to take off the charred end of the joist, disconnect it with the flue and brace it up, and remove some boards that were in dangerous proximity to the flue.

Defendant introduced the depositions of two witnesses, Bacon and Barr, who stated they were travelling over Douglas and adjoining counties prospecting, in February, 1902; that on the night of February 20, 1902, they went to plaintiff's store to buy some tobacco; that when they got there they found the door fastened, but on looking through a window they saw plaintiff near a lot of shavings and broken boxes piled on the floor of the store, and saw him strike a match and set the pile on

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fire; that being strangers they ran to their camping place, hitched up their team and drove away. The force of the testimony of these witnesses was greatly weakened, if not entirely neutralized, by their cross-examination and by evidence offered in rebuttal.

The court of its own motion gave the following instruction to the jury:

"The plaintiff sues the defendant on a policy of fire insurance. The issuance of the policy is admitted and the evidence shows and it is conceded that the fire occurred. There are two defenses, which the evidence tends to show, either of which is sufficient to defeat a recovery by plaintiff if proven by the evidence. One of these defenses is the claim that there was a change in the conditions in and about the premises and that plaintiff failed to notify defendant of such change. With reference to this you are instructed that if there was a material change in the premises before the fire, that is, if any damage occurred to the building or any repair thereof was made which in any way might be considered as increasing the risk or danger of fire, or if any alteration thereof was made which might reasonably be considered as increasing the risk or danger of fire, or if any alteration thereof was made which might reasonably be considered as affecting the risk, then the plaintiff was compelled to notify the defendant thereof, and, having failed to do so, the jury if they find such aforesaid alterations or changes to have occurred, should find the issues in favor of the defendant. The other defense above mentioned is the claim that plaintiff intentionally caused the fire for the purpose of destroying the building and goods. If you find from the evidence that plaintiff intentionally caused the store to be set on fire then your verdict should be for the defendant. The burden of proving these defenses is on defendant, and it must be shown by a preponderance or greater weight of the evidence, and in case they are not

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so established your verdict should be for plaintiff. If you find for plaintiff you will ascertain the amount of his damage in the following manner: Ascertain the loss as to the building: If this exceeds $400 then you will allow plaintiff $200 thereon. If the total loss to building is less than $400 then you will allow paintiff one-half of such total loss. Ascertain the total loss as to the furniture and fixtures. If this equals or excels $250 allow plaintiff $150. If it is less than $250 allow plaintiff only three-fourths of such total loss.

"Ascertain the total loss as to the stock of goods. If this equals or exceeds $3,700 allow plaintiff $1,500. If the total loss to goods is less than $3,700 allow plaintiff only fifteen thirty-sevenths of such total loss.

"You are the sole judges of the credibility of the witnesses and of the weight to be given to their testimony. In passing upon the weight to be given to the testimony of the witnesses you are to consider their demeanor on the stand, their interest, bias or prejudice in the case, if any appear, their relationship to the parties, the reasonableness or unreasonableness of their testimony, their opportunities for knowing the facts about which they testify and any and all other facts and circumstances which in your judgment would add to or detract from their credibility. If you find for plaintiff you will allow six per cent interest on the account from sixty days after the receipt by defendant of the proofs of loss."

At the instance of the defendant the court gave the following instructions:

"1. The court instructs the jury that you should not disregard the testimony of witnesses given by depositions for reason that such witnesses are not present and testifying in the case, but you should consider and weigh such evidence by the same rules as other evidence in the case.

"2. The court instructs the jury that one of the

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questions submitted to them is whether the fire originated by any act, design or procurement of the plaintiff or through any evil practice done or suffered by him or by his privity or with his consent. In deciding this question every fact and incident connected with the fire and subsequent transactions as detailed in evidence before them and decide according to what they consider the most probable conclusion. The rule in civil cases like the present is different from what it is in criminal cases. In criminal cases the question is as to the guilt or innocence of the crime and there the jury must be satisfied that the offense was committed beyond a reasonable doubt by the parties accused. In criminal cases if any doubt remains in the minds of the jury they are bound to give the accused the benefit of such doubt, but in civil cases like the present there is no question whether any crime has been committed. The question in this case is merely a question of greater or less probability and the jury in order to find a verdict for the defendant need not be satisfied of the complicity of the plaintiff in the burning in any other way or with any different degree of satisfaction than if the question were an ordinary question in a civil case."

The court refused the following instructions asked by defendant:

"1. The court instructs the jury that under the pleadings and evidence in this case plaintiff is not entitled to recover and your verdict must be for defendant.

"2. The court instructs the jury that if you find from the evidence that after the policy sued on was issued and before the fire mentioned in the petition another fire occurred in said building, then it became the duty of the plaintiff immediately to notify defendant of such previous fire, and if plaintiff failed to give defendant notice of said first fire prior to the second fire, plaintiff is not entitled to recover.

"3. The court instructs the jury that if you believe

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and find from the evidence that plaintiff intentionally caused the fire which destroyed the building he is not entitled to recover and you ought to find for the defendant."

The verdict was for plaintiff in the sum of nineteen hundred and sixty-one dollars. A motion for new trial proving of no avail, defendant appealed to this court.

BLAND, P. J. (after stating the facts as above.)—1. There was no error in striking out that part of the answer in respect to what plaintiff's son did in plaintiff's absence; it was not alleged that he ordered or directed the stove to be filled with combustible material at night or that he ever had any knowledge or notice that it had been done. Under no theory of law or justice, is he chargeable with the alleged wrongful act of his son. Wertheimer-Swarts Shoe Company v. U. S. Casualty Company, 172 Mo. 135.

2. Under the clause of the policy, to-wit: "This policy shall be void if the hazard be increased by any means within the control or knowledge of the insured," the policy was not forfeited by the sawing off of the charred end of the joist and removing boards that were in close contact with the flue; by removing them, the evidence shows, the hazard was diminished rather than increased, and the plaintiff was not required to give notice of the alteration. Baldwin v. Ins. Co., 56 Mo. 151.

3. Defendant procured two continuances on account of the alleged absence of material witnesses. In the first one, it was alleged that Henry Miller and A. J. Clark, one alleged to be a resident of the State of Kansas, and the other of Grove, Indian Territory, were absent and if present would swear that they saw what the witnesses William Bacon and E. J. Barr testified by deposition they saw, to-wit, plaintiff set fire to boxes in his store on February 20, 1902. This application was

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sworn to by W. C. West, agent of defendant. The second application alleged that W. H. Graham and wife, and James E. Graham, who had formerly resided in Denlow, but had removed therefrom, if present would swear that they were present on the night of the fire and would swear that W. H. Graham was permitted by plaintiff to remove certain goods from the building and told that he might receive and retain the goods. None of these witnesses testified at the trial, nor were their depositions taken or their absence accounted for. It was shown that West, the agent of defendant, had been active in hunting up witnesses for the defendant; that he discovered Bacon and Barr and was present at the taking of their depositions. Over the objection of the defendant, plaintiff was permitted to read both applications as evidence in rebuttal. This ruling of the court is assigned as error. There are no admissions against the interest of defendant in either of the applications and they were not offered for the purpose of showing any such admissions; but were offered in rebuttal for the purpose of showing want of good faith in the defense and as affecting the credibility of defendant's witnesses, Bacon and Barr. If they had that tendency it was not error to admit them; if not, then the reading of them to the jury was error, and prejudicial error at that. It will be noticed in the first application that neither Bacon or Barr is mentioned, but Miller and Clark are the witnesses and the persons named who would swear to the facts which Bacon and Barr ultimately swore to. They (Bacon and Barr) both testified that neither of them ever went under the name of Miller or Clark, so it appears that defendant's agent, West, was mistaken in one or two things; mistaken in the names of his witnesses when he made the affidavit for a continuance or mistaken as to what they would swear and subsequently discovered his error and then discovered Bacon and Barr whose depositions, tending to

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establish the defense, were procured. This discovery we can infer was made after the second continuance and only a short time before the day set for the trial of the cause, as the depositions were not taken until on the very eve of the trial; all of which looks suspicious to the man of average experience in the trial of law suits. The suspicion is that Bacon and Barr were "trumped up witnesses," and we think the affidavits were circumstantial evidence tending to show that Bacon and Barr were not worthy of credit.

4. The inventory required to be made once a year was made in August previous to the fire. It contained an itemized account of the merchandise then on hand and furnished the defendant a full and detailed account of the merchandise in the store at the time it was made, the bills of what had been subsequently bought and put in the store, and showed all the additions made to the stock after the inventory was taken. But there was no itemized account of what had been sold for cash, no bill of particulars. The amount of cash taken in was entered daily in a book kept for that purpose and the aggregate of cash taken in was shown to be nineteen hundred and forty-nine dollars. The sales on credit were shown to have been $147.45. The average per cent of profit at which plaintiff sold was said by him to be twenty per cent above the cost price, hence all the data was present from which an approximately correct estimate of the contents of the store at the time of the fire could have been readily made. But it is contended that this was not a compliance with the requirements of the policy in respect to keeping a set of books. That requirement reads as follows: "The assured shall keep a set of books which shall clearly and plainly present a complete record of business transactions, including all purchases, sales and shipments both for cash and credit from date of invoice." A literal compliance with this provision



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of the policy would require the assured to record each article sold, its cost, the price sold for, and the name of the purchaser. We do not think a failure to comply literally with this provision of the policy should work a forfeiture. The purpose of the requirement was that in case of loss or damage the assured would have kept such book accounts of his invoices, purchases and sales as would show the amount of goods on hand at the time of the fire and thus furnish data from which to make a reasonably correct estimate of the loss or damage. We think the plaintiff, by the production of the invoice taken in August, previous to the fire, his bill of purchases after the invoice, his daily cash sales and sales on credit made after the taking of the invoice, furnished the data by which the amount and value of the goods in the store at the time of the fire could have been reasonably estimated and that he ought not to be held to have forfeited his policy for having failed to literally comply with the clause of the policy under consideration.

5. The policy contained a three-fourths value clause. The instruction given by the court in respect to the measure of damages ignored this clause. It is competent for a fire insurance company and the assured to fix the measure of damages in case of loss or damage by fire. Millis v. Ins. Co., 95 Mo. App. 211; Roberts v. Ins. Co., 94 Mo. App. 142; Dolan v. Ins. Co., 88 Mo. App. 666. But it is contended by plaintiff that this error was non-prejudicial, for the reason the evidence shows that three-fourths of the value of the property destroyed exceeds the total amount of all the insurance. The total insurance on the building was four hundred dollars, on fixtures two hundred and fifty dollars, on the stock of merchandise thirty-seven hundred dollars. The evidence shows the loss on the building to have been six hundred dollars, on fixtures, three hundred and seventy-five dollars, on stock, from fifty-two to fifty-three hundred dollars. Three-fourths of the loss on the building

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would be four hundred and fifty dollars, or fifty dollars in excess of the total insurance. Three-fourths of the loss on the stock would be from thirty-eight hundred and fifty-five dollars to thirty-nine hundred dollars, or from one hundred and fifty-five to two hundred dollars in excess of the total amount of the insurance. Three-fourths of the value of the fixtures would be $281.25 or $18.75 in excess of the total amount of the insurance. We agree that the error in the instruction in respect to the measure of damages was non-prejudicial.

6. The closing address of plaintiff's attorney to the jury is incorporated in the bill of exceptions. It is too lengthy to be copied in this opinion. He traveled out of the record, objections were made, the court reprimanded the counsel, and the objectional comments were withdrawn. Afterwards the counsel, in a forcible and impassioned manner, commented on the conduct of the defense and referring to the allegations in the answer charging plaintiff with incendiarism, appealed to the jury to vindicate him by finding a verdict in his favor. An examination of the whole record does not convince us that this line of argument was wholly unjustifiable. The trial court who heard all the arguments of counsel in the case, was in a much better position to know whether or not the jury were improperly influenced than we are, and having found they were not, we do not think the argument of counsel is of a character wholly unwarranted, nor can we come to the conclusion that it prejudiced the jury. Wendler v. People's House Furnishing Company, 165 Mo. 527. The verdict is supported by the overwhelming weight of the evidence and we do not think it should be disturbed.

The judgment is affirmed. *Reyburn* and *Goode, JJ.*, concur.

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# FAIRBANKS, MORSE & COMPANY, Respondent, v. MIDVALE MINING & MANUFACTURING COMPANY, Appellant.

**St. Louis Court of Appeals, March 29, 1904.**

1. **PLEADING: Tacit Admission of Answer: Defective Petition Cured by.** In an action for the purchase price of chattels, which the petition alleged were sold under a contract, consisting of a letter from plaintiff quoting the price and conditions of sale, and a letter of defendant accepting the offer but stating terms of payment, where the answer, after a general denial, seeks to avoid the obligation by alleging failure on plaintiff's part to perform the conditions of the contract, on its part, such allegation of the answer was a tacit admission that the offer of sale was accepted unconditionally and the contract fully agreed upon, and removed the necessity of an allegation in the petition to that effect.

2. **SALES: Delivery.** In an action on a contract for the purchase price of goods sold, when the place of delivery is named in the contract, plaintiff must allege and prove a delivery or tender of delivery at the place named in the contract, or a sufficient excuse for non-tender.

3. ———: ———: **Pleadings: Waiver.** Where the petition alleged delivery at one place and the contract set up required delivery at another place, but the answer alleged that "when plaintiff offered to deliver (the goods), the defendant refused to accept them at the time and in the manner offered because great loss would thereby ensue to" defendant, this allegation of the answer showed a waiver of delivery at the place provided in the contract.

4. **PLEADINGS: Warranty: Aiding Defective Allegation.** The failure of the petition to allege that the chattels delivered were of the quality warranted in the contract, was aided by an allegation that defendant received and accepted them, the latter allegation carried with it the implication that the goods were of the kind warranted.

5. **SALES: Measure of Damages.** The measure of damages in action for goods sold and delivered on special contract, is the contract price with legal interest from the date payment is due.

Appeal from St. Louis City Circuit Court.—*Hon. John A. Blevins*, Judge.

AFFIRMED.

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*Thos. A. Russell* for appellant.

(1) The trial court should have sustained the objection of defendant to the introduction of any testimony. Failing to do this, the court should have given the instruction in the nature of a demurrer to the evidence at the end of plaintiff's case. (a) Plaintiff on its part complied with all the terms of the contract sued on. Weber v. Ins. Co., 5 Mo. App. 51; Parks v. Heman, 7 Mo. App. 18; McNees v. Ins. Co., 61 Mo. App. 335. (b) The delivery of scale f. o. b. East St. Louis, was a condition precedent to recovery, and plaintiff must allege in its petition that it performed this condition of the contract on its part. Bayse v. Ambrose, 32 Mo. 484; Denny v. Kile, 16 Mo. 450; Turner v. Mellier, 59 Mo. 535; Larrimore v. Tyler, 88 Mo. 661; Roy v. Botelor, 40 Mo. App. 222; Price v. P. & F. Co., 77 Mo. App. 240; Lumber Co. v. Lumber Co., 89 Mo. App. 144; R. S. 1899, sec. 634. Every fact which plaintiff must prove to maintain its suit is constitutive and must be alleged. Pier v. Heinrichhoffin, 52 Mo. 333; Sidway v. Mo. Stock Co., 163 Mo. 375; Harrison v. Kansas City, 50 Mo. App. 336. (c) The contract required the scale to be delivered f. o. b. East St. Louis, and the petition alleges "plaintiff delivered said scale at and upon the premises of defendant," thereby negativing the fact that it delivered the scales as the contract requires. If this contract was modified so that the vendor could deliver the scale upon the defendant's premises such change should have been pleaded, and failing to do so, no evidence of such modification was admissible. Wilson v. Russeler, etc., 91 Mo. App. 280; Halpin v. School District, 54 Mo. App. 375. (d) The plaintiff contracted to furnish, free of charge, an expert scale builder to frame timbers and superintend erection of scale. The petition fails to allege that plaintiff furnished or offered to furnish an expert to do this work. (e) The con-

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tract provides: "We guarantee the scale to be our best grade, durable and accurate, in fact, a perfect weighing machine." There is no allegation that plaintiff delivered or offered to deliver a scale of that character. Fruit Co. v. McKinney, 65 Mo. App. 220; Silberman v. Clark, 96 N. Y. 522. (2) Both the pleading and evidence demonstrate that plaintiff is not entitled to recover. In order to recover for a breach of contract, plaintiff must aver and prove performance on its part. Billups v. Daggs, 38 Mo. App. 367; Fuchs v. St. Louis, 133 Mo. 197.

*Jones, Jones & Hocker* for respondent.

(1) There was abundant evidence to support the findings of fact made by the court; in fact, the appellant does not contend that the findings of fact made by the court are unsupported by the evidence. This court will therefore assume the facts to be as found by the lower court in passing upon the points involved. Nichols v. Carter, 49 Mo. App. 405. (2) Appellant's first point is that the pleadings and evidence show that the plaintiff did not comply with the written contract sued on, and that it did not allege and show that the scales were delivered f. o. b. East St. Louis, as the contract required. We take issue with the appellant in assuming that the contract required the scales to be delivered f. o. b. East St. Louis. Lumber Co. v. Railroad, 54 Neb. 325; Company v. Coal & Coke Company, 101 Ala. 481; Fruit Co. v. McKinney, 65 Mo. App. 220. (3) Appellant next contends that plaintiff did not offer defendant a scale of the best grade, a durable and a perfect weighing machine as it guaranteed. If the plaintiff failed to live up to its warranty the burden was on the defendant to show that fact. Branson v. Turner, 77 Mo. 495.

BLAND, P. J.—The parties to the suit are business corporations. Omitting formal parts, the petition is as follows:

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"For cause of action plaintiff states that heretofore, to-wit, on or about the eleventh day of July, 1901, plaintiff and defendant entered into a contract whereby plaintiff agreed to sell, deliver and erect for defendant one 80 ton 40 ' Fairbanks standard iron frame railroad track scale, with all latest patent improvements, at and for the sum and price of four hundred and thirty-three dollars ($433), which said amount defendant promised and agreed to pay to plaintiff one-third in cash upon the erection of said scales and the balance in ninety days thereafter, which said contract and agreement is in words and figures as follows:

"St. Louis, Mo., July 11, '01.

"Midvale Mining & Mfg. Co.,

"No. 401 Security Bldg., City.

"Gentlemen: We are pleased to quote you as follows: 80 ton 40 ' Fairbanks standard iron frame railroad track scale, with all our latest patent improvements, $433.

"These prices are f. o. b. East St. Louis, and we will furnish, free of charge, an expert scale builder to frame the timbers and superintend erection of the scale foundation to be furnished by your company.

"We guarantee the scale to be our best grade, durable and accurate, in fact, a perfect weighing machine, and as you doubtless appreciate the importance of having something reliable for your work, we will hope to be favored with your valued order.

"Yours very truly,

"FAIRBANKS, MORSE & CO.,

"By FRANK REITER.

"Accepted. Terms one-third cash as soon as scale is erected, bal. in ninety days. Accepted July 11, 1901.

"MIDVALE MINING & MFG. CO.,

"J. E. CARTWRIGHT, Prest.

"Plaintiff says that in pursuance of said contract and agreement, it thereafter, to-wit, on or about the

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first day of August, 1901, delivered said scale at and upon the premises of the defendant, and has ever since been ready, willing and anxious to erect said scale, but that the defendant has failed to and refused, and still refuses to permit plaintiff so to do, and in violation of said contract and agreement, has sent said scales away from said premises, and has undertaken to cancel its said contract or agreement with plaintiff. Plaintiff says that by reason of the premises above set forth, defendant has become, and now is, indebted to the plaintiff in the sum and amount of $433, together with interest thereon from the first day of August, 1901, and costs of this suit, for which plaintiff prays judgment."

The answer is as follows:

"Defendant now comes, and, answering plaintiff's petition herein, says that, except as hereinafter admitted, it denies each and every allegation of said petition.

"Further answering, defendant says that plaintiff did not deliver or offer to deliver to defendant scales of the size, character and dimensions described in plaintiff's petition, as required by the terms of its contract.

"Wherefore defendant says it is not indebted to plaintiff as charged in the petition.

"For a further answer defendant says that it was distinctly understood by both plaintiff and defendant that the scales mentioned in the contract were to be used by defendant in weighing, in car load lots, the incoming and outgoing freight of defendant company, and that they were built in and upon a railroad track leading up to defendant's manufacturing establishment, and that the erection of said scales would require a suspension of defendant's business and of all traffic upon said track while being erected. That by the terms of said contract the defendant was to furnish the lumber and material for the erection of said scales and plaintiff to furnish an expert scale builder to frame the timbers

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and superintend the erection thereof, and that plaintiff was to give the defendant due and reasonable notice of the delivery of said scales, so that defendant could purchase and have on hand such material and lumber and could so arrange its business that said railroad tracks could be torn up during the time required to erect said scales, which plaintiff says would be about two weeks. That plaintiff failed to give such notice or any notice of its intention to deliver said scales. That plaintiff did not deliver or offer to deliver said scales on board cars, as required by the contract. That when plaintiff offered to deliver said scales, defendant refused to accept them at the time and in the manner offered, because great loss would thereby ensue to it, and so notified plaintiff, and it was then and there agreed by and between the plaintiff and defendant that said scales should be unloaded and left on defendant's premises subject to plaintiff's order until such time as defendant could be ready to accept and have the same erected, and, in accordance with such agreement, they were so unloaded and left in defendant's charge.

"That, notwithstanding such agreement, plaintiff thereafter and before defendant was ready to accept and erect said scales, demanded payment therefor and threatened suit against defendant in the event of its failure to make such payment, and that thereupon defendant notified plaintiff it would remove the same from its premises, and, upon plaintiff's insisting upon payment, accordingly did so and sent them to plaintiff.

"Defendant says that by reason of the premises it is not indebted to plaintiff in any sum whatever, and it prays for its costs herein laid out and expended."

The plaintiff replied as follows:

"Now at this day comes the plaintiff, and, for reply to defendant's answer filed herein, denies all of the new matter in said answer contained, except plaintiff admits that, under the contract sued on, defendant was

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to furnish the timber for the erection of said scales, and that plaintiff was to furnish an expert scale builder to frame the timber and superintend the erection thereof.

"And plaintiff again prays judgment as in the petition."

A jury was waived and the issues were submitted to the court, who, after hearing the evidence, at the request of plaintiff made the following findings of fact:

"That on or about July 11, 1901, the plaintiff and defendant entered into a contract in writing, in and by the terms of which the defendant agreed to purchase and the plaintiff to sell one 80 ton 40 foot standard iron frame railroad track scale at and for the price and sum of $433.00 f. o. b. St. Louis; that afterwards, on or about August 1, 1901, plaintiff delivered to defendant on its premises in East St. Louis said scale, and same was accepted by defendant; that thereafter defendant refused to pay for said scales or to use the same and undertook to return them to plaintiff, who refused to accept them in return; that defendant made no demand upon plaintiff to erect said scale, and made it impossible for plaintiff to erect the same."

Defendant appealed.

At the threshold of the trial, the defendant objected to the introduction of any evidence for the following reasons:

"First, plaintiff does not allege in its petition that it delivered or offered to deliver a scale of the description set forth in the contract.

"Second, the contract requires the scale to be delivered f. o. b. East St. Louis. While the petition avers that it was delivered on the premises of the defendant, it does not state that the premises are in East St. Louis, and negatives the fact that they were delivered f. o. b., East St. Louis.

"That the petition does not allege that plaintiff furnished, or offered to furnish, free of charge, an ex-

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pert scale builder to frame the timbers and superintend the construction of the foundation.

"That the plaintiff does not aver in its petition that it has complied with its part of the contract. It does not allege that plaintiff furnished or offered to guarantee that the scale was of its best grade, accurate and a perfect weighing machine.

"That the paper sued on is not a contract, but a mere quotation of prices or terms on which plaintiff would contract.

"The acceptance changes the terms of the quotation of prices, and is not, therefore, an unconditional acceptance of the order, and plaintiff was not bound, and hence the defendant was not bound."

The objections of defendant were overruled.

Plaintiff offered evidence tending to prove the contract sued on, the delivery of the scales at defendant's place of business at East St. Louis, Illinois, and the reception and acceptance of the scales by the defendant. Plaintiff also offered evidence showing that on several occasions it offered to erect the scales for the defendant but was prevented from doing so by the defendant.

1. In respect to the contract, it is to be observed that the answer nowhere specifically denies its execution or that the terms were agreed upon, and while it does not, in so many words, admit its execution, it tacitly admits that it entered into the contract as alleged in the petition and seeks to avoid its obligations thereunder by alleging failures on the part of plaintiff to perform the conditions of the contract on its part, therefore, it can not be said that the letter of plaintiff (set forth in the petition) offering the scales, and defendant's answer accepting the offer and stating the terms of payment, are insufficient to show an unconditional acceptance of the offer made by plaintiff and hence a completed contract. The tacit admissions of

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the answer, that the terms of the contract were fully agreed upon, remove any doubt that might otherwise arise in respect to the making of the contract as alleged in the petition, and there was no error on this score in overruling defendant's objection to the introduction of any evidence.

2. The petition alleges that the plaintiff agreed to sell and deliver and erect for defendant "one 80 ton 40' Fairbanks standard iron frame railroad track scale, with all latest improvements," etc. (setting out *in haec verba* the contract). The petition alleges that in pursuance of the contract, the scales were delivered at and upon the premises of defendant. Defendant contends that the petition fails to allege performance of the contract by the plaintiff in this, that whereas the contract was for delivery f. o. b., East St. Louis, the petition alleges delivery at defendant's premises, East St. Louis. It is settled law that in an action on a contract for the purchase price, where the place of delivery is named in the contract, plaintiff must both allege and prove a delivery or tender of delivery at the place named in the contract or a sufficient excuse for non-tender. Bayse v. Ambrose, 32 Mo. 484; Turner v. Mellier, 59 Mo. l. c. 535; Price v. P. & F. H. Protection Co., 77 Mo. l. c. 240; Southern Lumber Co. v. Lumber Supply Co., 89 Mo. App. 144. If, therefore, as contended by defendant, the place of delivery provided for by the contract was f. o. b. East St. Louis, the petition failed to allege the performance of this condition by the plaintiff, and the objection to the introduction of any evidence in support of the petition should have been sustained, unless the defect is cured by the answer. The place of delivery provided by the contract was f. o. b. East St. Louis. The offer made by plaintiff was to sell defendant scales for $433, followed by this clause: "These prices are f. o. b. East St. Louis," that is, plaintiff's offer was to sell the scales to defendant for $433 and to load

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them on cars at East St. Louis without charge or expense to the defendant. The offer, in this respect, was accepted as tendered and the place of delivery was, therefore, f. o. b., East St. Louis. Fruit Co. v. McKinney, 65 Mo. App. 220; 1 Mechem on Sales, sec. 618; 13 Am. & Eng. Ency. of Law, vol. 14 , p. 726. But by its answer the defendant shows a delivery f. o. b. East St. Louis was waived by the following allegations therein: "That when plaintiff offered to deliver said scales, defendant refused to accept them at the time and in the manner offered, because great loss would thereby ensue to it, and so notified plaintiff," and it was then and there agreed by and between the plaintiff and the defendant that said scales should be unloaded and left on defendant's premises subject to plaintiff's order until such time as defendant could be ready to accept and have the same erected. This averment conclusively shows that plaintiff did not object to receiving the scales because not tendered f. o. b. East St. Louis, as provided in the contract, but objected for the reason it was not ready to use the scales on its premises and agreed that they might remain on ts premises until such time as it could be ready to have the scales erected. This shows a clear waiver of the stipulation in the contract to deliver f. o. b. East St. Louis, and for this reason the court properly overruled defendant's second ground of objection to the introduction of any evidence by plaintiff.

3. The objection, that the petition does not allege that plaintiff delivered to defendant scales of the best grade, durable and a perfect weighing machine, was aided by the allegation of the petition, that defendant received and accepted the scales. This allegation (that defendant received and accepted the scales) carries with it the implication that the scales were of the kind and quality warranted, as proof that defendant did receive and accept the scales would cast a burden upon

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it to show a breach of the warranty, in respect to the kind and quality of the scales. Branson v. Turner, 77 Mo. 489; Calhoun v. Paule, 26 Mo. App. l. c. 282. The situation would be different if the petition showed the contract remained unexecuted, as if the scales had been tendered but defendants refused to accept them, then it would be incumbent upon the plaintiff, as vendor, to allege and prove a compliance on its part with all the terms and conditions upon which the defendant agreed to purchase the scales and that it tendered scales filling the description and warranty contained in the contract. Weber v. Ins. Co., 5 Mo. App. 51; Parks v. Heman, 7 Mo. App. l. c. 18.

4. The measure of damages for goods sold and delivered and accepted on special contract is the contract price with legal interest from the date payment became due under the terms of the contract. This was the rule adopted by the court in estimating the damages. The evidence tends to show, and the trial court found, the scales were delivered and accepted by the defendant. Its liability, therefore, to pay the contract price became absolute as there was no breach of the warranty of the scales alleged, as a counterclaim or off-set. We think there is abundant evidence in the record to support the findings of the learned trial judge and to show that the judgment is for the right party.

The judgment is therefore affirmed. *Reyburn* and *Goode, JJ.*, concur.

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## HARGADINE-McKITTRICK DRY GOODS CO., Appellant, v. SAPPINGTON & RENSHAW et al., Respondents.

**Kansas City Court of Appeals, February 15, 1904.**

1. **PARTNERSHIP: Attachment: Individual Debt: Priority.** The prior attachment of an individual creditor of a partner levied on the partnership assets, will not prevail over the subsequent attachment of a partnership creditor.

2. ———: ———: ———: **Lien of: Partnership Creditor.** The fact that a partner borrowed money to purchase his interest in a partnership will not make his creditor a partnership creditor and so give him a *quasi* lien on the partnership effects, so that such prior attachment will prevail over subsequent attachment of partnership creditor.

Appeal from Moniteau Circuit Court.—*Hon. Jas. E. Hazell*, Judge.

REVERSED AND REMANDED (*with directions*).

*Moore & Williams* for appellant.

(1) Section 415 of the Revised Statutes as to settlement of priorities in attachments, is construed by the Supreme Courtin its general application. Stephenson v. Stationery Co., 142 Mo. 13; Drake on Attachments, 455; Talbot v. Harding, 10 Mo. 350; Prichard v. Toole, 53 Mo. 358; Harris v. Harris, 25 Mo. App. 501. (2) The money was not borrowed of the bank for the firm, and if it had been, the bank could not claim a prior lien to that of the firm creditors. Farmers Bank v. Bayliss, Hudgers, 35 Mo. 428; Farmers Bank v. Bayliss, 41 Mo. 274; Hill v. Bell, 111 Mo. 35; Hundley v. Farris, 103 Mo. 79; Goddard-Peck Grocery Co. v. McCune, 122 Mo. 426; Level v. Farris, 24 Mo. App. 445; Skavdale et al. v. Moyer, 46 L. R. A. 480. (3) In the case at bar, H. B. Sappington filed his motion verified by

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affidavit, for the distribution of the firm assets to firm creditors, and not to the Moniteau National Bank, the individual creditor of Renshaw. He had the right to this, though it was not absolutely necessary, the assets of the insolvent firm being in the receiver's hands for administration. Freedman v. Holberg, 89 Mo. App. 340. (4) The appointment of a receiver did not change the rights of attaching creditors of the firm. Their attachment lien was superior to that created by a prior attachment of the same property by the Moniteau National Bank—an individual creditor of Renshaw, one of the partners of the firm. First National Bank v. Brenneisen, 97 Mo. 145. This case is nearly on all fours with case at bar.

*R. M. Embry* for respondent.

(1) It is conceded by all parties that an attachment by garnishment was proper, and that attachments first in point of time must be first paid. Westheimer & Sons v. Giller, 84 Mo. App. 122; Stephenson v. Stationery Co., 142 Mo. 13. (2) The attachment of the appellant was abandoned, when it, through attorneys, applied for and secured the appointment of a receiver. 3 Am. & Eng. Ency. of Law (2 Ed.), 239; Mooney v. Kavanaugh, 4 Me. 277; Bowley v. Bowley, 41 Me. 542; Gathercole v. Bedel, 65 N. H. 211. (3) In order to give partnership creditors priority over individual creditors, the objecting partners must make an exhibit of the partnership assets and furnish the court with a list of the partnership creditors and a statement of their claims. There was nothing of this kind in this case. Edwards & Son Brokerage Co. v. Rosenheim, 74 Mo. App. 626; Bates on Partnership, section 820; Reyburn v. Mitchell, 106 Mo. 365; Goddard-Peck Grocery Co. v. McCune, 122 Mo. 426; Hardware Co. v. Randell, 69 Mo. App. 345.

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ELLISON, J.—The mercantile partnership of Sappington & Renshaw became insolvent and they committed acts which caused several of their creditors to attach the partnership property. One of these partnership creditors was plaintiff, the Hargadine-McKittrick Dry Goods Company. The defendant, Moniteau National Bank, was an individual creditor of Renshaw. The bank levied an attachment for Renshaw's individual debt, on the partnership property prior to the levy made by either of the partnership creditors. The attachments were all confessed. The partnership had given a chattel mortgage on the property before any of these proceedings and it was about to be foreclosed at a great sacrifice and to the injury of creditors. The partnership attaching creditors then filed an application with the judge of the circuit court in vacation asking the appointment of a receiver, in which the defendant Moniteau National Bank was made a party. A receiver was appointed who took charge of the property and sold it. This contest is over the proceeds of that sale and involves a question of priority; that is, whether the defendant bank as individual creditor with prior attachment, can be preferred to a partnership creditor with subsequent attachment. The plaintiff Hargadine-McKittrick Dry Goods Co. were the last in point of time to levy their attachment and if the claim of defendant bank is to be preferred there will be nothing left for them; and hence the contest here is chiefly between them as partnership creditors and the bank as an individual creditor. The bank claimed that the greater part of the debt owing to it was used by Renshaw to purchase his interest in the partnership, and that therefore it had a lien for this purchase-money. The trial court, as near as we can gather from the somewhat imperfect record, took that view and ordered



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that the bank, under its prior attachment, be first paid. Plaintiffs appealed.

The bank makes a double claim: first, that having the prior attachment which passed into judgment, it is entitled to preference. This we reject as unsound. Bank v. Brenneisen, 97 Mo. 145. And second, that its claim being for money borrowed by the individual partner which he used in purchasing his interest in the partnership, it had a lien, or prior equity over a partnership creditor. We feel constrained to rule this point also against the defendant.

The law is not now disputed that a partnership creditor is preferred in his claim against the partnership property over an individual creditor of one of the partners. And that an individual creditor is preferred in his claim against the individual property of one of the partners over the claim of a partnership creditor on such property. Hundley v. Farris, 103 Mo. 78; Goddard-Peck Co. v. McCune, 122 Mo. 426; Level v. Farris, 24 Mo. App. 445. And an attachment against one partner alone levied on partnership property only binds the interest of that partner. Hill v. Bell, 111 Mo. 35.

A prior attachment of the partnership property by an individual creditor can not give him prior rights over the partnership creditor when all proceedings are pending at the same time, and the partnership creditors have set up their claim of priority, as in this case, by their proceeding for a receiver. The result of the view taken for defendant would be to nullify the general provision of law giving priority to partnership creditors. For if mere priority of attachment determined priority of claim, such law could rarely find practical effect, since if the partnership creditor was prior in attachment he would not need the law, and if he was subsequent in attachment, he could not assert the law.

2. Defendants claim of a lien for the money bor-

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rowed by the individual partner, and that, too, before he was a partner, can not be upheld. It is sometimes permitted to be shown that what appears to be an individual debt is really a partnership debt, by some means, in the individual's name. But here the debt owing to the bank was for money borrowed for the individual purpose of buying his interest in the partnership. And when he made such purchase, the property immediately became partnership property. It became the property of his copartners in common with himself. It became impressed with the rights of the other partners, prominent among which, is that of having it first applied to the discharge of the partnership's debts, a right which the creditors can be subrogated to, or, as it is sometimes expressed, a right which gives the creditors a *quasi* lien which they can work out through the partner's lien. McDonald v. Cash & Hainds, 57 Mo. App. 536.

The judgment will be reversed and cause remanded with directions to disallow the claim of defendant bank against the fund in the receiver's hands. All concur.

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BURRISS & HAYNIE, Respondent, v. THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

**Kansas City Court of Appeals, February 15, 1904.**

1. **COMMON CARRIERS: Affreightment: Evidence.** A contract of affreightment signed by the consignor in duplicate, one copy of which is retained by the carrier is admissible in evidence between the consignee and the carrier since it is equally binding on both.

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2. ——: ——: **Parties: Action.** A contract of affreightment with a common carrier may be enforced by either the consignee or the consignor.

Appeal from Saline Circuit Court.—*Hon. Samuel Davis*, Judge.

REVERSED AND REMANDED.

*M. L. Clardy* and *Wm. S. Shirk* for appellant.

(1) We earnestly contend that the court erred in excluding the contract of shipment from the evidence. The defense, that no notice of claim for injury or damage to the cattle had been given to the defendant within one day after the cattle had been delivered to plaintiffs, at destination, nor before said cattle had been mingled with other stock, could not be made or sustained without this contract going into evidence. This defense was and is a good and valid one. Dawson v. Railway, 76 Mo. 514; Crow v. Railway, 57 Mo. App. 135; Brown v. Railway, 18 Mo. App. 577; Ward v. Railway, 158 Mo. 226; Leonard v. Railway, 54 Mo. App. 297. (2) The contract of shipment was signed by the consignors, the Drovers' Live Stock Commission Company, and was stamped in ink at two different places on the contract, as follows: "The Mo. Pac. Ry. Co., Kansas City, Mo., stock yards, Dec. 17, 1901." This was a sufficient signature by the railway company and sufficiently indicated its intention to be bound by the contract. Beach on Md. Law Contracts, sec. 578; Horner v. Railway, 70 Mo. App. 285; Pomeroy on Contracts, sec. 74. (3) Besides it does not lie in the mouth of plaintiffs to object to the contract because not signed by the defendant. The Missouri Pacific Railway Company only could make that objection. The contract was signed by the shipper—the Drovers' Live Stock Commission Company. It was accepted by the defendant, and one of the plaintiffs, Haynie, signed the pass agreement on the back of it and

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used it as his transportation, and under it the railway company carried the cattle to destination. Am. Pub. & Eng. Co. v. Walker, 87 Mo. App. 503; Stone v. Pennock, 31 Mo. App. 544; Lindell v. Rokes, 60 Mo. 249. (4) Besides the stamp of the Missouri Pacific Railway Company, affixed or stamped upon the contract before the stock was shipped, was a sufficient signing of it, and a sufficient indication of its intention to be bound by it, and was at least prima facie evidence of an acceptance of the contract by the defendant, without more. Horner v. Railway, 70 Mo. App. 285; Rapalje & Law., Law Dic., title "Signature;" Lyons v. Holmes, 11 S. C. 429; Daniel on Neg. Ins., secs. 74 and 75; Am. Pub. and Eng. Co. v. Walker, 87 Mo. App. 503.

*Harvey & Gower* for respondent.

(1) A contract to be binding must be mutual and capable of being enforced against either one of the parties. Glass v. Rowe, 103 Mo. 513; Smith v. Wilson, 160 Mo. 657; Waterman on Specific Performance, sec. 196. (2) There is no evidence whatever that plaintiff accepted a performance of the provisions of the contract. Plaintiff Haynie testified that he never saw the contract; that he wrote his signature "on the back of the paper;" that it was made out for him as a stock pass. But there is no evidence that he ever used any stock pass. A unilateral contract, to be binding, must be assented to by some positive act of the nonsigning party, and such party must accept a performance of the provisions of the contract. Am. Pub. and Eng. Co. v. Walker, 87 Mo. App. 503. (3) There was no evidence that the stamp of the Missouri Pacific Railway Company was placed on the contract offered in evidence by anyone having any authority to do so, nor is such stamp any evidence of defendant's intention to be bound by the contract, nor does the printing of a signature prove

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itself. It must be shown to have been adopted and used by the party as his signature before it can bind him. Daniel on Neg. Ins. (5 Ed.), sec. 74. (4) There is no evidence that the agreement was an executed one. (5) The written contract offered in evidence by appellant was not admissible under the pleadings.

SMITH, P. J.—The defendant is a public carrier and this action was brought against it for the breach of its common-law duty. To the general denial of the answer was added allegations in substance that the only cattle which defendant ever undertook to transport in which plaintiffs claim to be interested were three carloads said to contain 104 head which were delivered to it by the Drovers' Live Stock Commission Company and consigned to plaintiffs, but the defendant did not know whether they were the same as those described in the plaintiffs' petition; that the only contract of shipment ever made with regard to said cattle was entered into with the said Drovers' Live Stock Commission Company and not with plaintiffs, and that it was not liable to plaintiffs under said contract. It was further alleged that the only contract which it ever made with the Drovers' Live Stock Commission Company for the transportation of three carloads of cattle was a written contract in which the defendant is recited to be a party of the first part and the Drovers' Live Stock Commission Company was the party of the second part. Certain limitations and restrictions contained in the contract are pleaded and by reason of which it was claimed the defendant was not liable. The replication was a general denial.

There was a trial before a jury during the progress of which the defendant offered in evidence the contract of affreightment pleaded in the answer, and which offer was by the court rejected on the ground that it—the contract—did not appear to have been executed by the

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defendant. It does not appear to have been signed by the defendant, though its name appears to have been twice imprinted thereon with a rubber stamp. Under some circumstances this would not perhaps be regarded as a sufficient signing or execution, but whether it was signed by the defendant or not the evidence shows that it was delivered by it to the consignor and signed in duplicate by the latter, one copy of which was retained by defendant and the other was delivered to the plaintiffs and the cattle shipped under it. The plaintiffs, as appears from the signature of one of them on the back of the contract, accepted a pass issued by defendant to them in accordance with the stipulations of said contract, and so it will not do to say that such a contract though not signed by one of the parties is not equally binding on them both. Under these conditions it is as binding as if it had been signed by both. Am. Pub. & Engrav. Co. v. Walker, 87 Mo. App. 503.

Although the answer pleaded that the contract was entered into with the Live Stock Commission Company, the consignor, yet an action could be maintained by the plaintiffs, consignees, for any breach of it. " . . . And it may be stated generally that if goods are delivered to the carrier on behalf of the consignee and at his request or by his direction, either express or implied, and no other fact appears, the legal presumption will be that the property right in the goods immediately upon such delivery became vested in him and that he is the proper party to bring an action against the carrier, either in assumpsit in his own name upon the contract with the consignor as his agent or in a case for breach of duty on the part of the carrier, or in the name of the agent for his use upon the special contract of affreightment." Hutchison on Carriers, sec. 734, and cases cited. It is therefore obvious that the contract thus executed is one whose obligations may be enforced by either party to it. No good reason is seen why the restrictive

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contract pleaded by defendant should not have been received in evidence. The exclusion of it necessarily precluded the defendant from the further development of the several defenses pleaded by its answer, and in that way it was prejudicial.

The judgment must accordingly be reversed and the cause remanded. All concur.

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## JOHN HYATT, Respondent, v. J. C. VAN RIPER et al., Appellants.

Kansas City Court of Appeals, February 15, 1904.

1. CORPORATIONS: Partnership: Liability of Directors. Individuals comprising a corporation may render themselves personally liable to creditors by their actions, defaults and representations; and where such action operates as a fraud on third parties the relation of partnership may be said to exist between incorporators with respect to such parties.

2. ———: ———: ———: Capital Stock: Dissolution. The liability of the directors attaches though the corporation has not been formally dissolved where the capital stock has never been paid and the corporation was insolvent from its inception; and also where the business is not conducted as a corporation but all payments are made by one of the incorporators without any money passing through the treasurer of the corporation and without any corporate action.

3. ———: ———: Pleading: Judgment. A petition against incorporators alleged that plaintiff contracted upon the faith of the company being what its articles of association warranted, to-wit, solvent. *Held*, it stated a cause of action which supports a judgment on the ground of partnership.

Appeal from Pettis Circuit Court.—*Hon. George F. Longan*, Judge.

AFFIRMED.

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*Sangree & Lamm* and *Montgomery & Montgomery* for appellant.

(1) The court below held the defendants liable as partners, explicitly stating so in its findings and instructions. The only allegation in the petition upon which this finding can be based, is the charge that they filed articles of association, stating that the capital stock was full paid when in fact it was not full paid and the articles of incorporation were procured by false and fraudulent representations. So the court found that the mere failure to pay the capital stock in full, when it is so certified in the articles of association thereby creates a partnership between the original subscribers to the articles. (2) This is not one of that class of abortive corporations, where the incorporators attempting to incorporate never complied with the statute and did not secure the proper certificate, as in Hurt v. Salisbury, 55 Mo. 310, as afterwards modified by Furniture and Carpet Co. v. Crawford, 127 Mo. 367. Nor yet is it within the unique act of the legislature (Laws 1903, page 122), pertaining to foreign corporations doing business in this State and following the language and ruling of this court in Cleaton v. Emory, 49 Mo. App. 345, and Davidson v. Hobson, 59 Mo. App. 130. (3) The plaintiff can not in this action assert that the corporation was not legally formed. R. S. 1899, sec. 1314. If the record is false, the State may question it, but until the franchise claimed is directly adjudged not to exist, it is a corporation *de facto* at least, and its existence can not be inquired into collaterally. Kayser v. Bremen, 16 Mo. 90; St. Louis v. Shields, 62 Mo. 251; State ex rel. v. Fleming, 147 Mo. 10; Belt v. Hamilton, 130 Mo. 300; Casey v. Galli, 94 U. S. 679; 1 Morawetz on Cor., sec. 69; Cochran v. Arnold, 58 Pa. St. 406. (4) To hold that fraud annuls the grant of incorporation and the charter, subjecting it at any time and place to collateral

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attack, is not only against authority but such a doctrine would produce most disastrous and mischievous results. Haskell v. Worthington, 94 Mo. 568. (5) But it is urged by respondent that the court found that the capital stock was not full paid as the defendants had certified it was, and that this was a fraud, rendering the defendants jointly and severally liable to plaintiff. The petition does not contain the essential allegations to charge defendants under the old and familiar action of fraud and deceit. There is no averment that the defendants knew the alleged representations were not true or any averment taking its place. This is fatally defective. Walsh v. Morse, 80 Mo. 572; Austre v. Ober, 26 Mo. App. 669; Paretti v. Rebenack, 81 Mo. App. 498; Green v. Worman, 85 Mo. App. 574; Edwards v. Noel, 88 Mo. App. 439; Brockett v. Griswold, 112 N. Y. 469; Carp v. Chipley, 73 Mo. App. 33; Utley v. Hill, 155 Mo. 259.

*Cashman & Bohling* for respondents.

(1) A charter of a corporation procured by fraud has no legal existence, and the promoters and members thereof assuming to carry on its business under its corporate name are no more than partners in the enterprise. Davidson v. Hobson, 59 Mo. App. 130. (2) The books quite uniformly agree, that a corporate creditor seeking to enforce the payment of his debt may ignore the existence of the corporation, and may proceed against the supposed stockholders as partners by proving that the prescribed method of becoming incorporated was not complied with by the company in question. Cook on Stock and Stockholders, 233, and cases cited; Beach on Corporations, sec. 162 and authorities, supra; Cleaton v. Emery, 49 Mo. App. 356. (3) The petition in the case at bar is based upon the ground that none of the capital stock purported to have been sub-

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scribed and paid up as stated in the articles of association, it was in fact paid up. Therefore under the above authority cited, the incorporators become liable to the plaintiff as partners independent of a statute, and plaintiff has a right to sue them jointly or severally upon the contract, that he was induced to enter into believing that it was a valid corporation. Loverin v. McLaughlin, 161 Ill. 417; McClure v. Iron Co., 90 Mo. App. 584; Shields v. Hobart, 172 Mo. 510; Kersey v. O'Day, 173 Mo. 560. (4) It is not necessary to enforce a stockholder's liability to either allege or prove fraud. Shields v. Hobart, 172 Mo. 510; National Tube Works v. Gilfillan, 124 N. Y. 302; Cleaton v. Emery, 49 Mo. App. 356; Davidson v. Hobson, 59 Mo. App. 134; Glenn v. Bergmann, 20 Mo. App. 346; Steam Cutter Co. v. Scott, 157 Mo. 525. (5) The liability of Van Riper is fixed from any point of view taken of this case, as there was behind him no responsible principal, nothing but a shadow cast upon the transaction by his adroit maneuvers. Riffe v. Proctor, 74 S. W. 410; Ins. Co. v. Burkett, 72 Mo. App. 3; Potter v. Bassett, 35 Mo. App. 425; Zeigler v. Fallon, 28 Mo. App. 298; Glenn v. Bergman, 20 Mo. App. 346; Furniture Co. v. Crawford, 127 Mo. 367; Heath v. Gosling, 80 Mo. 316; Farris v. Thaw, 72 Mo. 446; Berkley v. Benacke, 59 Mo. 195; Tapsley v. McKinstry, 38 Mo. 245; McClellan v. Parker, 27 Mo. 162.

BROADDUS, J.—The allegations of plaintiff's petition are substantially as follows:

That defendants on the ninth day of June, 1899, filed certain articles of association of what was known as the Sedalia Electric and Heating Company, showing a capital stock of $100,000 divided into 1,000 shares of $100 each, purporting to be all subscribed for by defendants, and that the full amount of such capital stock had been paid, whereas no part thereof had then or has since, been paid; that afterwards on the eighteenth day

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of July, 1899, the defendants falsely and fraudulently represented to plaintiff that the entire capital stock was paid up and that the corporation was duly organized, solvent and ready to meet any and all liabilities; that plaintiff believing such representations and relying upon them, and relying upon the articles of association and the statements therein, was induced to enter into a certain contract with said company, with which he has fully complied; and that under said contract said company became indebted to him in the sum of $4,103.18, of which $628.18 is still due and owing to him. The petition further avers that the said company never had any legal existence and no authority to enter into said contract for the reason that the said articles of incorporation were procured by false and fraudulent representations made by defendants; and that said company had no assets to pay plaintiff's claim.

The court upon request of the parties made a finding of facts, which is as follows: "That the 996 shares of stock subscribed by Stewart and the one subscribed by Zimmerman were not paid into the treasury of the corporation; that there were no false representations made by Mr. Van Riper to Mr. Hyatt as to the capital being fully paid up which were relied upon by Mr. Hyatt as an inducement to enter into the contract."

The evidence showed that the payment credited upon plaintiff's claim did not come out of the company's treasury but was realized upon a sale of its property on a judgment in favor of a company supplying materials for the erection of the plant. The defendant Van Riper testified that what money he used in the company's business was furnished by Stewart who lived in the State of New York and who was reputed to be wealthy. The defendants were all stockholders and directors of the company. The so-called directors never met after the incorporation.

The court found for the plaintiff on the theory that

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defendants were liable as partners. Having already found that the contract was not entered into by plaintiff by reason of any representations of defendants as to the solvency of the company, there was nothing else upon which to base its finding. If, as contended by plaintiff, the said company had no legal existence, there can be no question of the correctness of the court's finding and judgment.

In Loverin v. McLaughlin, 161 Ill. 417, it was held: "The directors and officers of a corporation are under the statute liable for its debts contracted by them in the name of the corporation before the certificate of its complete organization has been recorded in the county where its principal office is located. Most certainly, if defendants set up to do business under the style of a corporation which had no existence, they would be liable as partners, as the mere name under which they were doing business would not relieve them from liability as such."

"A charter to conduct an exposition at St. Joseph, Missouri, was obtained from the State of Colorado with a capital stock of $1,000,000, when in fact there was only $43,000 stock subscribed. The whole business of said corporation was to be conducted at St. Joseph, Missouri. *Held,* the rule of comity does not protect such corporation which was a fraud upon the laws of both States, and only colorable and absolutely void, and the incorporators were partners, and liable as such for the debts of the alleged corporation." Cleaton v. Emery, 49 Mo. App. 345. Judge Gill, who rendered the opinion of the court, in speaking of the law of comity, quoted and approved the following from Morawetz on Private Corporations: "This law of comity was not established for the purpose of giving any State an unlimited power to dispose of the franchise of acting in a corporate capacity in other States. To obtain a charter for the purpose of evading the laws of a foreign State, under cover of the rule of comity, would be a fraud upon the

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State granting the charter; and to attempt to act under such charter in the foreign State would be a fraud upon the latter." In Davidson v. Hobson, 59 Mo. App. 130, the defendants had represented that they were acting for a corporation called the Steel Bar Company, when, in fact, it had no corporate existence. The court held defendants liable as partners.

Individuals composing an incorporated company may render themselves personally liable to its creditors by their acts, defaults and representations, such for example as representing the company to be solvent when they have knowledge to the contrary; permitting their assets to be wasted; or using their corporate existence as a cloak for the prosecution of an illegal business. Beach on Private Corp., sec. 163. And where there has been no legal incorporation, the members are individually liable as partners for all the obligations of the organization. And when the conduct of the parties operates as a fraud or deceit upon third parties, whatever their private intentions may be, the relation of partnership may be said to exist between them with respect to such third persons. Idem, sec. 163; Story on Partnership, sec. 49.

The authorities cited all go to the principle, that under certain circumstances the members of a corporation may be held liable to third persons as partners. There can be no doubt but what such liability would exist where the members of a corporation falsely represent their corporation to be solvent when in fact it is not. But as the finding of the court was that plaintiff was not induced to contract upon such representations the judgment can not be upheld on that ground.

The theory of the court, as has been stated, was that the defendants under the evidence were liable as partners, which involves a more serious question. And the finding and judgment must be sustained, if at all, upon the ground of fraud. The defendants in procur-

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ing the incorporation without having paid any part of their subscriptions to the stock of the corporation no doubt committed a fraud upon the State for which upon the hearing of a writ of *quo warranto* its charter would be annulled. But its existence as a corporation can not be inquired into in this proceeding. If, however, its incorporation under the circumstances was a fraud upon the State, it was likewise a fraud upon third persons having dealings with it. And to so hold would in no sense be challenging its corporate existence. It is not a party to the suit, and notwithstanding plaintiff says it has no corporate existence, we think differently.

Said company so organized was a fraud as to all the world having dealings with it, of which the defendants must be held, as a matter of law, with full knowledge. And it is not sufficient to assert that liability can not attach to the directors who were *participes criminis* until the charter of the company had been regularly annulled by a decree of court, for such may never happen, in which event plaintiff would be without remedy. Surely, it can not be that directors of said company, insolvent at its inception, are exempt from liability to third persons who contracted with it in good faith believing it to be what it purported as solvent, and as so held out by defendants to the world under the certificate and seal of the State, fraudulently procured by them. It would be legalized fraud.

And besides, the defendants and the other directors of the association did not adopt the usual methods of a corporate body in the transaction of business. Whenever any money was to be used it was furnished by Stewart as the monied partner of the concern. It did not go into the treasury of the company. Not a dollar ever went into or out of it. No meetings of the directors were ever held at any time. Everything that transpired was as in the usual course as between partners. Partners in fact the defendants were; and we so hold.

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As the petition alleges, among other things, that plaintiff contracted upon the faith of the company being what its articles of association warranted, viz., solvency, the petition in that respect stated a cause of action which supports the judgment. Other allegations of said petition are treated as surplusage.

For the reasons given the judgment is affirmed. All concur.

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## J. H. KYLE, Appellant, v. THOS. T. GAFF et al., Respondents.

**Kansas City Court of Appeals, February 15, 1904.**

1. **REAL ESTATE BROKER: Agency: Death of Principal.** Where the landowner dies the authority of the real estate broker to sell the land ceases.

2. ———: ———: **Knowledge of Principal: Agent's Notice.** The principal is only bound by such knowledge as an agent obtains in the scope of his employment; and where a real estate broker's action in attempting to sell the land became known to a special agent of the landowner notice can not be imputed to the latter.

3. ———: ———: **Evidence: Ancestors: Heirs.** The mere fact that the broker of the ancestor after the death of the latter participated in the efforts to sell the land has no probative force to bind the heirs and render them liable to commission.

4. ———: ———: **Ancestors: Heirs.** Knowledge of the general agent of an ancestor that a real estate broker was continuing his efforts to sell the land after the owner's death can not bind the heirs.

Appeal from Henry Circuit Court.—*Hon. W. W. Graves,* Judge.

AFFIRMED.

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*Peyton A. Parks* for appellant.

(1) When real property is placed in the hands of a broker for sale, he is entitled to his commission if he brings about a sale by his own exertions, or introduces a purchaser, or gives his name, whereby a sale is perfected with the principal. Wetmore v. Wagoner, 41 Mo. App. 509; Henderson v. Mace, 64 Mo. App. 393; Stinde v. Blesch, 42 Mo. App. 278. (2) It is a general rule of law that notice to an agent, during the existence of the agency, and in reference to business coming within the scope of the agent's authority, is notice to the principal. Rhinehart v. People's Bank, 89 Mo. App. 511; Smith v. Boyd, 162 Mo. 146; Bank v. Fry, 168 Mo. 492; Latimer v. Loan and Inv. Assn., 78 Mo. App. 463. (3) Knowledge of the facts by another agent, where the matter is within the scope of his agency, is sufficient. Mining Co. v. Rocky Mountain National Bank, 2 Col. 565. (4) Proof that a party subsequently ratified a prior unauthorized act of one assuming to be his agent, has the same effect as if the evidence established agency. "By ratifying the unauthorized act, the principal assumes and adopts it as his own." Mechem on Agency, sec. 167; McLachlin v. Barker, 64 Mo. App. 526.

*C. C. Dickinson* and *Lindsay & Hinkle* for respondents.

(1) Plaintiff was never at any time the agent of Rachael S. Gaff, or of these defendants. 1 Am. and Eng. Ency. of Law (2 Ed.), 949; Rosseau v. O'Brien, 4 Biss. (U. S.) 396; Stewart v. Bickering, 73 Iowa 652. (2) At all events, if any authority can be implied, or agency held to have been created by the letter of Parker to Kyle dated May 25, 1900, such authority terminated with the death of Rachael S. Gaff.



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Bishop on Contracts (enlarged Ed.), secs. 1052 to 1056; 1 Am. and Eng. Ency. of Law (2 Ed.), 1222; Dick, Ex'r of Doughty, v. Page, 17 Mo. 23. "Agency can not be implied from a former employment in the same capacity without further proof." 1 Am. and Eng. Ency. of Law (1 Ed.), 342. (3) Whatever acts of plaintiff concerning the sale of the land, which were done after March 4, 1901, the date of the death of Rachael S. Gaff, were the acts of a volunteer. Painter v. Ritchey, 43 Mo. App. 111; Watkins, Admr'x, v. Richmond College, 41 Mo. 302. (4) Defendants can not be charged with notice, nor bound by the acts of Parker as the agent of Rachael S. Gaff prior to her death, nor are they chargeable with notice of what Chisman may have known concerning the efforts of plaintiff to sell the farm. Bank v. Fitze, 76 Mo. App. 356; Benton v. Bank, 122 Mo. 332; Anderson v. Volmer, 83 Mo. 403; Hayward v. Ins. Co., 52 Mo. 181; Richardson v. Palmer, 24 Mo. App. 480; Wheeler v. Terminal Co., 66 Mo. App. 260; Choteau v. Allen, 70 Mo. 290; Richardson v. Palmer, 24 Mo. App. 480; Smith v. Broyd, 162 Mo. 157. (5) Chisman, in endeavoring to find a purchaser for the land, and to earn a commission thereby, was acting in his own interest, and not as the agent of the defendants. The law does not presume that he would communicate facts that he would consider against his interest, and the law does not charge defendant with notice of such facts. Reinhard on Agency (1 Ed.), sec. 356; 23 Am. and Eng. Ency. of Law (2 Ed.), 889; 1 Am. and Eng. Ency. of Law (1 Ed.), 431.

BROADDUS, J.—Prior to her death, Rachael S. Gaff was the owner of a farm containing 660 acres in Henry county, Missouri, which she was desirous of selling. Mrs. Gaff did not transact business herself but always acted through her agent, James D. Parker, who

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had power to act as fully as she could herself. Mrs. Gaff died on the 29th day of March, 1901; prior thereto by her agent she had placed the said land in the hands of plaintiff for sale. Upon her death the lands passed to defendants by will or descent. After her death said Parker became the agent of defendants with the same authority he had while agent of Mrs. Gaff. The plaintiff introduced evidence tending to show that after the death of Mrs. Gaff his agency to sell the land was renewed by Parker; that he procured a purchaser at defendants' price; that the defendants consummated the sale so made by him, accepting the purchaser and conveying the land; and that defendants had notice through one Chisman who had authority from Parker to sell; that he, plaintiff, had procured said purchaser. The evidence of defendants was contradictory to that of plaintiff except as to that part relating to notice to said Chisman that plaintiff had procured a purchaser for the land. Chisman was not introduced to either confirm or contradict that part of plaintiff's testimony. The respective parties have discussed the evidence in detail, but as there was a conflict in the particulars mentioned, which was a matter for the court to weigh and determine which was preponderated on the issue raised, it will only become necessary to pass upon the question of law presented for our consideration.

A jury was waived, the cause was tried by the court and finding and judgment were for the defendants.

The court tried the case on the theory that the authority of plaintiff to sell the land devised from Mrs. Gaff terminated upon her death. There can be no doubt that the court was right in so holding, as it is elementary law that the authority of the agent terminates upon the death of his principal, unless it be specified that such authority is to continue longer. The declarations of law given by the court are to the effect that after the death of Mrs. Gaff all authority of plaintiff under his

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agency from her ceased and that in order for him to recover he must show that after her death such agency was continued by Parker in behalf of defendants; and that under such agency he procured the sale of the land in question. Or, that plaintiff must show that he procured the sale with the knowledge of defendants; or, that defendants knew at the time of the sale that plaintiff had procured the purchaser. The finding of the court was against plaintiff on each of these theories; which is conclusive upon him, except it be upon that relative to defendants having notice of plaintiff being the procuring cause of the sale made, of which there was no evidence save that which related to the knowledge of said Chisman as the agent of defendants.

Knowledge of an agent is not always to be attributed to the principal. If Chisman was an agent he was in no sense a general one. The defendants were only bound by such knowledge as he obtained within the scope of his employment. Hickman v. Green, 123 Mo. 165. It would not do to say that knowledge, obtained by Chisman that plaintiff, who had no authority as an agent (and it must be conceded he had none, for the court so found) was engaged in procuring purchasers, must be imputed to defendants. To do so would be in effect clothing him with the power of an agent with full authority over the whole business. The knowledge he obtained in the course of his own employment, and not with reference to what others were doing, alone can be imputed to his principal.

It follows therefore that plaintiff's participation in the sale of the land had no probative legal force, and the finding of the court that defendants had no notice of plaintiff's agency as the procuring cause of the sale was justified under the law governing the case.

And it also follows that the information that Parker had, while he was the agent of Mrs. Gaff, can not be imputed to defendants because he was not then their

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agent. Anderson v. Volmer, 83 Mo. 403; Wheeler v. Stock Yards Co., 66 Mo. App. 260; Richardson v. Palmer, 24 Mo. App. 480.

It does not appear that there was any error whatever in the trial of the cause and it is therefore affirmed. All concur.

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MEDORA JENNINGS, Respondent, v. KANSAS CITY, Appellant.

Kansas City Court of Appeals, February 15, 1904.

1. **APPELLATE PRACTICE: Motion for New Trial: Instruction.** To secure a review of a trial court's action in giving an instruction, attention must be called thereto in the motion for a new trial.

2. **MUNICIPAL CORPORATIONS: Defective Sidewalk: Contributory Negligence: Scienter.** The traveller may use an open highway though it is known to be in a defective condition; but must do so with care and his knowledge of the defect may be considered in passing upon his care.

Appeal from Jackson Circuit Court.—*Hon. James Gibson,* Judge.

AFFIRMED.

*L. E. Durham, R. J. Ingraham* and *J. W. Garner* for appellant.

(1) The court should have granted the instruction in the nature of a demurrer to the evidence asked by appellant at the conclusion of respondent's evidence. Cohn v. City of Kansas, 108 Mo. 387; Village of Kewanee, 80 Ill. 119; Cressy v. Town of Postville, 59 Iowa 62; Chicago v. Bixby, 84 Ill. 32; Huntingburgh v. First, 15 Ind. App. 557; Erie v. McGill, 101 Pa. 6; Dur-

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kin v. Troy, 61 Barb. 437; Centralia v. Krouse, 64 Ill. 19; Breland v. Kansas City, 32 Mo. App. 8; Foster v. Swope, 41 Mo. App. 146. (2) The court should have given instruction No. 9 asked by appellant. Cohn v. Kansas City, 108 Mo. 387.

*Wade & Wade* for respondent.

(1) This court will not consider appellant's first and third assignments of error, to-wit: the trial court's refusal to grant instructions offered by it, because it is not specified as one of the grounds of defendant's motion for new trial that the court erred in refusing proper and legal instructions offered by defendant, and the trial court's attention was not called to the matter. Brown v. Mays, 80 Mo. App. 81; State v. Headrick, 149 Mo. 404; Roberts v. Boulton, 56 Mo. App. 405; State v. Nelson, 101 Mo. 477. (2) There was ample evidence on which to let the case go to the jury and hence defendant's instruction in the nature of a demurrer to the evidence was properly refused.

BROADDUS, J.—This is a suit brought by the respondent against the appellant in which she seeks to recover damages from the appellant for injuries claimed to have been received by her while walking along the sidewalk on the south side of Twenty-sixth street, between Garfield avenue and Brooklyn avenue, at a place or point about eighty feet east of the east side of Garfield avenue and on the south side of Twenty-sixth street. The sidewalk is alleged to have become insecure and unsafe and dangerous for the public and for persons passing along and using the same, in this, that the boards or planks were permitted to become loose and unfastened and the stringers beneath them to become decayed at the point aforesaid. That such unsafe and dangerous condition existed on the nineteenth day of

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November, 1901, and had existed for a long time prior thereto. That the appellant had actual notice, or by the exercise of reasonable care and caution, could have had notice of such condition. That when respondent stepped on a loose and unfastened board, the board failed to sustain her weight and gave way, on account of its loose and unfastened condition and the decaying condition of the stringers beneath it; that the north end of said board suddenly and unexpectedly gave way and went down beneath her feet and the south end flew up, causing plaintiff's feet to go down through the hole in the said sidewalk made by said board giving way, thereby suddenly throwing plaintiff down and inflicting serious injuries upon her, for which she asks damages in the sum of $12,000.

The plaintiff's testimony tended to sustain the allegations of her petition. She testified that she had passed along the street many times previous to her injury, but she usually walked in the street and not on the sidewalk. She gave as her reason for doing so that she could walk better in the street and that it was habitual with her. While some of the evidence disclosed that the loose condition of the sidewalk was plainly visible, some of the witnesses stated that in passing over the walk they discovered no defects.

The jury returned a verdict in favor of the plaintiff for $3,500. The appellant urges two grounds for reversal, viz.:

That the court erred in refusing to give defendant's instruction in the nature of a demurrer to the plaintiff's evidence; and in refusing to give instruction number 9 asked by defendant.

The last objection we can not consider as the alleged error was not called to the attention of the court in defendant's motion for a new trial.

As to the first objection, the contention is that as the defect in the sidewalk was obvious and dangerous,

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the dangerous place could easily have been avoided by plaintiff by passing around it, or taking another side. That she was wanting in due care, and therefore it was the duty of the court to so declare as a matter of law. If the facts justify defendant's position then its contention must be sustained. Cohn v. Kansas City, 108 Mo. 387.

The evidence disclosed that the defects in the sidewalk were not so obviously dangerous as would prevent a person of ordinary prudence from undertaking to pass over it. The books contain many cases where recovery for injuries has been sustained on walks in like condition. And it is well-settled law: "A person is not bound to abandon the use of a highway open to the public for the simple reason that it is known to him to be out of repair or in a defective condition. The duty, however, is imposed upon the traveler to use ordinary care to avoid the defect, and knowledge on his part that the street is out of repair is a circumstance to go to the jury in determining the question whether he did use such care." Cohn v. Kansas City, supra; Phelps v. Salisbury, 161 Mo. 1. Affirmed. All concur.

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JOHN S. HARPER, Appellant, v. WM. C. FIDLER, Respondent.

Kansas City Court of Appeals, February 15, 1904.

1. **PRINCIPAL AND AGENT: Dual Agency: Public Policy: Middleman.** Where a double employment of an agent exists and is unknown to either party no recovery can be had against such party on a contract effected by such agent though there be neither designed duplicity nor fraud, but it is the consequence of an established public policy; and on the facts in this case there is no application of the rule relating to a mere middleman.

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2. **CONTRACT: Rescission: Dual Agency: Evidence.** On the pleading and evidence an instruction submitting to the jury the issue of rescission of contract effected by dual agency was justified.

3. **PRINCIPAL AND AGENT: Definition: Instruction.** The term agent in an instruction need not be defined since it is readily understood by a jury of usual intelligence.

4. **TRIAL PRACTICE: Pleading: Inconsistent Defenses: Instruction.** If defenses are inconsistent the plaintiff should move to strike them out of the answer but failing in that he can not raise the question by an instruction.

Appeal from Vernon Circuit Court.—*Hon. H. C. Timmonds,* Judge.

AFFIRMED.

*M. T. January* for appellant.

(1) Where the acts and admissions of a party clearly show that he did not rely upon the representations of the other party, he is not entitled to the finding of a jury on his own testimony that he did so rely. State v. Nelson, 118 Mo. 124; State v. Hamilton, 171 Mo. 377. (2) The fourth count of defendant's answer does not constitute a defense to this action and defendant's instruction No. 3 based thereon is erroneous. 45 L. R. A. 51, note, "middlemen." (3) The term "agent" in this action is a legal conclusion, and it was improper to require the jury to define it as was done in instruction No. 3. Cockrell v. McIntire, 151 Mo. 59; Rowen v. Railway, 82 Mo. App. 24; Dyer v. Brannock, 2 Mo. App. 432. (4) An instruction should not be given unless there is evidence on which to base it. Such is the vice in defendant's instruction No. 2. Marr v. Bunker, 92 Mo. App. 651. (5) Defendant's instruction No. 1 is erroneous, there being no evidence that the land was represented as "smooth and unbroken," and the materiality of each representation being assumed. Marr v. Bunker, 92 Mo. App. 651. (6) Defendant waived the

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the defense of mutual rescission and also the defense of double agency by his admission in the trial that his only reason for refusing to carry out the contract was on account of the misrepresentation of the 160 acre farm. Plaintiff's refused instruction No. 4 should have been given.

*Scott & Bowker* for respondent.

(1) If one makes a material misrepresentation, knowing it is not true, or makes a material statement as true, without knowing whether it is true or false, and it turns out to be false, and the other party relies upon it, and is thereby induced to trade, he is guilty of a fraud upon that party. And this rule applies of course, if the false statements are made by the agent. Chase v. Rusk, 90 Mo. App. 25; Cahn v. Reid, 18 Mo. App. 127; (2) Where a party by his instructions in effect, admits that there is sufficient evidence to submit the issue to the jury, he can not on appeal shift his position and claim the contrary. Hopkins v. M. W. of A., 94 Mo. App. 402; Mercantile Co. v. Burrell Sisters, 66 Mo. App. 117; James v. Hicks, 76 Mo. App. 108; Seiter v. Bischoff, 63 Mo. App. 157. (3) Where there is any evidence to support the verdict of the jury, the appellate court can not set it aside. Tower v. Pauley, 76 Mo. App. 287; Taylor v. Short, 38 Mo. App. 21; James v. Life Association, 148 Mo. 1. (4) If an agent is working for an adverse party without the knowledge or consent of his principal, it is good ground for the rescission of the contract, on the ground that it is against public policy. Dee Steiger v. Hollington, 17 Mo. App. 382; Atlee v. Fink, 75 Mo. 100; Insurance Co. v. Insurance Co., 8 Mo. 408; 2 Warvelle on Vendors (2 Ed.), 1004, section 852; MacDonald v. Wagner, 5 Mo. App. 56; Mechem on Agency, page 654, sections 796 and 798; Story on Agency (4 Ed.), section

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210. (5) The above rule applies although the parties bargained for themselves; they are entitled to the benefit of the skill, knowledge and advice of the agent. Chapman v. Currie, 51 Mo. App. 44. (6) The only qualification to the above rule in this State is where the principal knew of the double agency and consented to the same. Chapman v. Currie, 51 Mo. App. 40; Dee Steiger v. Hollington, 17 Mo. App. 382; Rosenthal v. Drake, 82 Mo. App. 358. (7) The courts of this State have never recognized any distinction between real estate brokers in general and mere middlemen. The rule of double agency applies to both with equal force. Dee Steiger v. Hollington, 17 Mo. App. 382; Norman v. Roseman, 59 Mo. App. 682; Rosenthal v. Drake, 82 Mo. App. 358; Chapman v. Currie, 51 Mo. App. 40; Reese v. Garth, 36 Mo. App. 641. (8) In those states where the rule of double agency does not apply to mere middlemen, they hold that the middleman must be absolutely disinterested. Leathers v. Canfield, 45 L. R. A. 33, and cases cited in notes. (9) A rescission of a written contract may be by parol, and may be inferred from the acts and the declarations of the parties. Choteau v. Iron Works, 94 Mo. 388; Fine v. Rogers, 15 Mo. 315.

SMITH, P. J.—The plaintiff was the owner of two tracts of land, one of which contained 200 acres and and the other 160. The defendant was the owner of a stock of clothing, boots and shoes in the city of Nevada which, owing to ill health, he desired to dispose of and go out of the mercantile business. One, Kolb, lived on the same street with plaintiff and was his neighbor and acquaintance. The former had for many years previously to the transaction to which we shall presently refer been in the employment of the plaintiff and his father who were engaged in the coal and seed business.

Early in October, 1902, the defendant employed

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Kolb to trade or sell his stock of merchandise for a certain commission. Two or three days after his employment Kolb came into defendant's store and handed him a typewritten description of the two tracts of land owned by plaintiff. The 200 acre tract was described as an "ideal combination farm, altogether one of the nicest country homes on the earth;" and the other—the 160 acre tract—"about 100 acres in cultivation, balance good timber, soil good, needs building up. Lays beautiful, not more than five acres waste land in place," etc. These descriptions were written by plaintiff and given to Kolb for defendant. Kolb arranged for a meeting of the plaintiff and defendant at the store of the latter. They accordingly met and the negotiations for the exchange of the store for the land were commenced. After the defendant had seen the description of the land and had heard and considered the representations of both plaintiff and Kolb, he signified an intention to make the exchange if after seeing the land he was satisfied with it. It was arranged that he should go out on the following day and examine it but when the day arrived he felt so ill that he concluded not to go and advised Kolb of the fact, telling him that he "guessed the trade was off." Kolb replied that, "you—defendant—are missing the bargain of your life. . . As a neighbor and a friend, Mr. Fidler, I can state to you that the land is worth every dollar Mr. Harper is asking for it—and it is a bargain to you. . . You had better go right down and close up this trade with John (meaning plaintiff). He is notionate—he is giving you a good trade and my advice to you as a neighbor is, to go down and close it up. The land is worth the amount. . . I am acting as your agent and do that honest."

The defendant did not go out to see the land but two days later on he concluded to trade with plaintiff and a written contract was prepared and signed by

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both under which it was agreed that plaintiff would take defendant's stock of merchandise at the "wholesale market price," and for which he was to convey the 200 acre tract of land at $35 per acre and the 160 acre tract at $15 per acre, defendant assuming the $4100 incumbrances thereon.

A future day was fixed for taking an invoice of the stock. In the meanwhile the defendant went and inspected the lands. He was well enough satisfied with the 200 acre tract but with the other he was not, for, as he testified, "I got out and went upon the ridge where the hedge fence was—the soil is black around it but then it dips down like a lake and the soil is all taken off of it (the land) and a ridge and furrows all in it. I walked in and it covered me up to my arm pits where the water had washed or made great ditches and there was trees growing up in what was supposed to be cultivating land; there were sprouts and small timber and some large timber also in the field. There was 12 to 14 acres that had been planted that season. Eighty acres had been in cultivation. There was not any soil practically; that is, growing soil at all. The timber had been chopped—culled—12 or 15 acres of it was waste land."

On the day the invoice was to be taken the defendant entered the store and calling plaintiff to one side said to him: "Mr. Harper, who is Kolb representing, you or me?" to which query plaintiff replied: "He is representing both of us." Thereupon the defendant said: "You both misrepresented this property to me—this farm lying south of town, and I am not going to trade." The defendant testified further that the plaintiff responded: "Well, you misrepresented your old goods to me, and I am not going to trade, either." The trade fell through. The plaintiff shortly afterwards tendered defendant warranty deeds for the land and demanded possession of the stock of merchandise.

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The defendant repudiated the contract. The plaintiff brought this action to recover damages for breach of the said contract claiming that he had been prevented from realizing a profit on the sale of the land, etc.

The answer alleged (1), that the plaintiff had represented to the defendant that 100 acres of the 160 acre tract was in cultivation and that the remainder was in good timber; that the tract was smooth and unbroken —not 5 acres of waste land in the entire tract; that said land was worth $15 per acre, etc.; that defendant relied upon said representations so made by plaintiff and believed them to be true and was so induced to execute said contract sued on; that said alleged representations were untrue and false, and that plaintiff knew they were untrue and false at the time he made them to defendant, but made them for the purpose of cheating and defrauding defendant; and (2) that after said written contract was signed and after defendant had ascertained that said land was not as represented by plaintiff; and that said Kolb, his agent, was also secretly acting as agent of plaintiff, that plaintiff and defendant mutually agreed to rescind said contract; and (3), that plaintiff employed said Kolb as his agent to find a purchaser for his stock of merchandise and that said Kolb brought about said sale between plaintiff and defendant, and that during all of the negotiations up to and including the signing of the contract, the said Kolb was acting as agent of defendant in said matter and until after the said contract was entered into and without the knowledge or consent of the defendant, the said Kolb was secretly acting as the agent of plaintiff.

There was a trial which resulted in judgment for the defendant, and to reverse which this appeal was prosecuted.

Several questions are raised by the appeal but that decisive of the case is as to whether or not the trial court erred in its action giving the defendant's third instruc-

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tion submitting the defense of dual agency, which was pleaded by the answer. This defense was amply supported by the evidence. Both plaintiff and Kolb testified that the latter in his capacity as real estate agent had the former's lands on his list for sale and had shown one of the tracts to one or more persons with the view of making a sale to them prior to the time of the trade between plaintiff and defendant. It was conceded that shortly after the commencement of negotiations between plaintiff and defendant the former employed Kolb in his business at a hundred dollars per month and that he was so in plaintiff's employ at the time the contract was entered into. There was testimony further showing that during the progress of the negotiations Kolb told Janes, an auctioneer, in confidence that "If I make this deal why I will get a commission out of John (plaintiff) and Fidler, both . . . I don't want you to say anything to prevent the trade. We will let you auction off the stock." Janes had been engaged twice a week in selling defendant's goods at public auction. On the day set for taking the invoice of defendant's goods, he inquired of plaintiff whom Kolb was representing in the negotiations which led up to the trade and the latter replied "both of us."

It is thus made obvious that Kolb in conducting the negotiations between plaintiff and defendant acted for both of them—in a dual capacity. The defendant testified that he did not know until after the contract was signed that Kolb was acting for anybody else excepting himself in the trade. In Huggins Candy Co. v. Peoples' Ins. Co., 41 Mo. App. l. c. 531 et seq., it was said by us: "The law which commands what is right and prohibits what is wrong we think does not tolerate an agency of this kind. It has laid the rigorous hand of its iron interdict upon such an agency. . . . The authoritative declaration that no man can serve two masters has reached us sanctioned by the experience of

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ages. . . . The cases are nearly if not quite uniform, where the double employment exists and is not known that no recovery can be had against the party kept in ignorance, and the result is not made to turn on the presence or absence of designed duplicity or fraud, but is a consequence of established policy. . . . The antagonism which exists between the opposite parties to a bargain is generally recognized by law. Each acts and has a right to act with a view to his own interest and they deal at arms' length. Accordingly if one acts by an agent, that agent should be not nominally but really in place of the principal with his self interest undisturbed by calculations as to the interest of the opposing party. This, as well as the exercise of the best skill and judgment of his agent as to the contingencies of the bargain, the principal has the right to demand. Accordingly a contrivance which reduces the two parties to one and admits an agent representing antagonistic interests to make a bargain by himself is so far against the policy of the law that the contract is held void. . . . Such bargains are constructively fraudulent. . . . It is not necessary for a party seeking to avoid such a contract to show that any improper advantage has been gained over him—it is at his option to repudiate or affirm the contract, irrespective of the proof of actual fraud.'' All the cases in this State, the most of which are cited in the briefs of counsel, are to the same effect.

But the plaintiff insists that the rule just adverted to has no application to mere ''middlemen,'' citing in support of his insistence, 45 L. R. A. 51, and that Kolb is shown by the evidence to fall within that category. See Story on Agency, section 31 (note 2). But even if this exception obtains in this State, it can have no application to a case where the character of the agency is like that shown in this case.

The defendant was a comparative stranger in the

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State only having been a resident of it for a few months before the trade. Kolb was his neighbor and acquaintance to whom he looked for advice and by whose opinions and judgment he seems to have been greatly influenced. He not only relied on him in his capacity as agent to find some one who would trade lands for his store, but on his judgment as to the quantity and value of such lands. His relation to the defendant was such that he was entitled to his "best judgment as to the contingencies of the bargain." No case can be found whose facts afford a better illustration of the wisdom of the rule than this. It is plain to us that the duties and functions of Kolb far exceeded those of a mere "middleman," and the exception to the rule invoked by plaintiff is without application. Certainly this is not a case where a broker has simply brought the parties together and has had no hand in the negotiations between them, they making their own bargain without his aid or interference, as in the case cited and relied on by plaintiff. In all the "middlemen" cases which we have seen, we find they concur in stating that where the middleman has done anything to influence either party to make the sale the contract will not be enforced.

The undisputed facts of this case show that the contract sued on is one that must be condemned by considerations of public policy and can not be upheld. No finding and judgment upholding the contract in the face of the facts pleaded and proved would be permitted to stand.

We do not think the plaintiff was prejudiced by the giving of the defendant's third instruction in which the term "agent" is used without a definition of it. It is an English word in common use, the meaning of which is as well understood by any jury of average intelligence as that of "bargain" in plaintiff's second.



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Such words do not ordinarily require a definition in order to be understood by a jury composed of men of usual intelligence. The issue of dual agency having been submitted to the jury on ample evidence to justify it, and under an instruction unexceptionable in expression, the finding in favor of defendant is conclusive as to the entire case.

If the other issues tendered by the answer had not been sustained by the evidence, or if the instructions for the defendant submitting the same had been erroneous, the verdict would still have to stand, because no action to enforce the contract should be maintained. But however this may be, we do not think the court erred in submitting the issue of the rescission of the contract. There was, as we think, evidence justifying the giving of the defendant's second instruction submitting that issue. And the same remark is applicable to the defendant's first instruction given by the court. The plaintiff complains of the action of the court in refusing his fourth which declared that the third defense set up by defendant to the effect that the contract sued on was rescinded by mutual consent, and also the fourth defense to the effect that Kolb, while acting as defendant's agent, was secretly acting as agent for plaintiff in making the trade, were both eliminated from the case by the admission of the defendant.

If the defenses pleaded in the answer were inconsistent—if the proof of one would disprove the other—the plaintiff should have moved to strike them out; but failing in that, we do not see that this objection could be raised by an instruction. Even if the defendant did testify at the trial that the reason why he did not carry out the contract was that he "had been fooled," "that the land had been falsely represented," surely the admission so made did not have the effect to preclude him from the benefit of the other defenses

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pleaded and proved. We know of no rule of practice that would justify a court on any principle of waiver or estoppel to so instruct a jury. We think that the judgment was for the right party and accordingly it is hereby ordered to be affirmed. All concur.

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MARY PARMAN, Respondent, v. KANSAS CITY, Appellant.

**Kansas City Court of Appeals, February 15, 1904.**

1. **JURORS: Statute: Signing Verdict: Reading and Writing.** The mere signing a verdict by his mark is not alone sufficient to overcome the presumed qualification of a juror on the ground that he can not read and write the English language as required by the statute.

2. **DAMAGES: Instruction: Defendant's Duty.** An instruction in general terms that the damages should fairly compensate for injuries received is held sufficient since it was correct as far as it went and it was with defendant to make it more specific if desired.

Appeal from Jackson Circuit Court.—*Hon. Edw. P. Gates,* Judge.

AFFIRMED.

*R. J. Ingraham,* city counselor and *L. E. Durham* for appellant.

(1) Plaintiff's instruction on measure of damages is too vague and should not have been given. Hawes v. Stock Yds. Co., 103 Mo. 60; Camp v. Railroad, 94 Mo. App. 272; Badgley v. St. Louis, 149 Mo. 134; Stephen v. Railroad, 96 Mo. 207. (2) One of the jury was unable to write his name and hence there was not a competent jury in the cause. The court erred in not granting a new trial for this reason. R. S.

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1899, sec. L 3799; State v. Welsor, 111 Mo. 571; Johnson v. State, 21 Tex. App. 378; Rainey v. State, 20 Tex. App. 473; Mabry v. State, 71 Miss. 716. (3) Defendant had the right to presume that all the jurors possessed statutory qualifications, and if after trial it develops a juror could not write, defendant is entitled to a new trial. Road Co. v. Railroad, 13 Ind. 90; Mann v. Fairlee, 44 Vt. 672; Biggs v. Georgia, 15 Vt. 72; State v. Groome, 10 Iowa 316; Lane v. Scoville, 16 Kan. 405.

*Charles W. Clarke, A. S. Lyman* and *C. A. Miller* for respondent.

(1) Even though the court may think the instructions on the measure of damages are not as clear as they should have been; yet considering the evidence and the amount of the judgment, the court must conclude that the error, if there was error, was harmless and is not ground for granting a new trial. R. S. 1899, sec. 865; Haniford case, 103 Mo. 174. (2) The second assignment of error is because one of the ten jurors who signed the verdict signed by his mark; for this reason alone, this court is asked to grant a new trial. This contention is directly in conflict with sec. 3763, Revised Statutes 1899, and the express decision of this court in Pitt v. Bishop, 53 Mo. App. 603; Ledlie v. Gamble, 35 Mo. App. 356; Boteler v. Roy, 40 Mo. App. 238.

ELLISON, J.—This action is for damages alleged to have resulted to plaintiff by reason of a fall on one of defendant's sidewalks alleged to have been negligently maintained. The judgment in the trial court was for plaintiff. It appears from the record that the verdict was found by the concurrence of ten of the jurors and that one of these signed the verdict by what is commonly known as making his mark; that is, his name was signed by one of the other jurors and he made his

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mark, or cross, thereon. The verdict and judgment is attacked for the reason that the juror not being able to write was not a qualified juror. Our statute (sec. 3799, Revised Statutes 1899) reads; "None of the following persons shall be permitted to serve as jurors: . . ; third, any person who is not sufficiently acquainted with the English language to read and write the same, and to understand thoroughly the proceedings ordinarily had in courts of justice. . . ."

The only evidence we have that the juror complained of could not write, is that he made his signature to the verdict by making his mark, as above stated. We do not regard that as sufficient to establish his disqualification. It does not follow but that he may have been a scholar and in every way qualified, but with a disabled hand, he adopted the method stated as the best means he had of giving his consent to the verdict. We are satisfied that the mere signing by mark, was not, alone, sufficient to overcome the presumption of qualification which arose when he was accepted on the panel by the court and the parties as competent. This view makes it unnecessary to discuss the point as to when defendant should have made known its objection.

The remaining objection to the judgment is error claimed in an instruction for plaintiff, by reason of its generality. The instruction in general terms informed the jury that there might be allowed damages in such sum as would justly and fairly compensate her for the injury she received, if any, and for the pain and suffering occasioned thereby. The instruction was general, but was correct as far as it went; and if desired to be more specific, defendant should have framed one with that end in view, which would have made it as perfect as it is now claimed it should have been. Browning v. Railroad, 124 Mo. 55; Barth v. Railroad, 142 Mo. 535; Matthews v. Railroad, 142 Mo. 645; Robertson v. Railroad, 152 Mo. 382; Harmon v. Donohoe, 153 Mo.

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263; Railroad v. Shoemaker, 160 Mo. 425; Wheeler v. Bowles, 163 Mo. 398, 409; Haymaker v. Adams, 61 Mo. App. 581, 585. In the two last cases will be found a statement of cases formerly holding a different view which have been overruled by those here cited.

It follows from the foregoing that the judgment should be affirmed. All concur.

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JENNIE B. FAST, Administratrix, etc., Respondent, v. IRA O. GRAY et al., Appellants.

**Kansas City Court of Appeals, February 15, 1904.**

**APPELLATE PRACTICE: Motion for New Trial: Record Proper: Bill of Exceptions.** The abstract of the record proper should show that the motion for a new trial was filed within the required time and likewise that the bill of exceptions was filed; otherwise there can be no review in the appellate court save of the record proper.

Appeal from Pettis Circuit Court.—*Hon. Geo. F. Longan*, Judge.

AFFIRMED.

*John Cashman* for appellants.

Filed brief on merits.

*Barnett & Barnett* and *Bruce Barnett* for respondent.

(1) The appeal in this case should be dismissed for the reason that appellants have filed no abstract of the record as required by statute and the rules of this court. They have filed a statement containing some of the matters, which would properly belong to an abstract of the record, but they have filed no abstract nor

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anything which purports to be an abstract. (2) The appeal should be dismissed for the further reason that appellant's brief fails to allege the errors committed by the inferior court as required by Rule 17 of this court.

SMITH, P. J.—This is an action that was begun before a justice of the peace and from there it was removed by appeal to the circuit court where the plaintiff had judgment and the defendants appealed here.

The plaintiff has raised the objection that the record before us does not show that a motion for a new trial was filed in the trial court within the time required by the statute nor overruled by that court. The case was brought here what is commonly known as the short method authorized by section 813, Revised Statutes. It is true that that which purports to be a bill of exceptions does recite the filing and overruling of the motion, but the abstract of the record entries made by the clerk fails to show the filing and subsequent overruling of such motion. This omission is not supplied by any epitome contained in any part of the abstract or the statement.

It is well settled in this State that unless the record proper affirmatively shows that the motion was filed within the time required by the statute no matter of exception can be reviewed, but only such errors as are apparent upon the face of the record proper. Hill v. Combs, 92 Mo. App. 242; McCormick v. Crawford, 98 Mo. App. 323; Bates v. Ruth, 88 Mo. App. 550; St. Louis v. Boyce, 130 Mo. 572; Danforth v. Railroad, 123 Mo. 198, and cases there cited.

Besides this, there is another objection equally fatal to that just noticed, which is, that there is nothing outside of the recitals in the bill of exceptions—no entry or minute of the clerk—which shows that it—the bill of exceptions—was ever filed. Therefore, under the repeated rulings of all the revisory courts of this

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State, we are precluded from considering it. State v. St. Louis, 174 Mo. l. c. 125; Wilson v. Railroad, 167 Mo. 324; Roush v. Cunningham, 163 Mo. 173; Bates v. Ruth, 88 Mo. App. 552.

The restrictions operating upon our power to review preclude us from looking for errors beyond the face of the record proper, and finding no error there we are obliged to affirm the judgment. All concur.

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TENNENT SHOE COMPANY et al., Respondents, v. JOHN T. BIRDSEYE, Appellant.

Kansas City Court of Appeals, February 15, 1904.

1. **PARTNERSHIP: Damages: Law: Equity: Individual Liability of Partner: Pleading.** A petition against a partnership is examined and held to be an action at law for damages and not a proceeding in equity and it is further held that such action may be maintained against an individual partner after it is ascertained that the partnership itself is not liable and the other partner is dismissed from the cause, especially where the petition shows the liability of such retained partner.

2. **TRIAL PRACTICE: Pleading: Misjoinder: Judgment.** A judgment can not be invalidated for a misjoinder of parties plaintiff.

3. **PARTNERSHIP: Knowledge of Copartner: Notice: Trustee.** The fact that a trustee's partner may have knowledge of transactions not within the scope of the partnership will not effect the trustee with notice on such matter.

4. **WITNESSES: Evidence: Impeachment.** A deposition in a former suit is held competent to impeach a witness in a later suit involving the same matter.

5. **EVIDENCE: Notes: Mortgage.** Where several parties holding separate notes secured by the same mortgage of parties plaintiff in a damage suit against a trustee the mortgage describing the notes is competent evidence.

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Appeal from Vernon Circuit Court.—*Hon. H. C. Timmonds,* Judge.

REVERSED AND REMANDED.

*J. B. Johnson* for appellant.

(1) This is a case strictly in equity, and the issues should not have been tried by a jury. 22 Encyclopedia of Pleading and Practice, pages 135, 136 and 138; In re Ferguson Estate, 124 Mo. 583; State to use Kelley v. Thornton, 56 Mo. 325; Dillion, Admr., v. Bates & Co., 39 Mo. 299; Carr v. Waldron, 44 Mo. 393. (2) Having elected to sue the defendants, as partners, the action is against them jointly, and a joint liability must be alleged in the petition or there will be no cause of action stated. Steans v. Aguire, 6 Cal. 176; Downey v. Bank, 13 S. and R. 288; Walter v. Ginrich, 2 Watts 204. (3) There can not be a partnership in a trusteeship—it is strictly a personal matter. Parsons on Partnership (2 Ed.), 38, star page 37; Kelsay v. Bank, 166 Mo. 157; Bank v. Barksdale, 36 Mo. 563; Seeley v. Beck, 42 Mo. 143; Bales v. Perry, 51 Mo. 449. (4) Information received by one partner is not constructive notice to his partner acting in the capacity of a trustee. Benton v. Bank, 122 Mo. 332. Nor is information acquired by Birdseye, as attorney, notice to him as trustee. Am. & Eng. Encyclopedia (2 Ed.), 587. (5) Evidence of the claim of privilege in another case is incompetent to effect the credibility of a witness. Cane v. Litchfield, 2 Mich. 340; People v. Wilson, 55 Mich. 506; State v. Bailey, 54 Ia. 414; Hirsch v. Green, 83 Mo. App. 486; State v. Grant, 144 Mo. 65.

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*C. H. Graves* and *M. T. January* for respondents.

(1) A party injured by an irregular or tortious sale under a deed of trust need not move to set the sale aside. He has his action against the trustee for damages. Sherwood v. Saxton, 63 Mo. 78; Tobener v. Hassinbush, 56 Mo. App. 591; Price v. Blankenship, 124 Mo. 203. (2) An equitable right may be enforced in a legal action. Morse v. Bates, 74 S. W. 439; Tobener v. Hassinbush, 56 Mo. App. 591. (3) It is the duty of the trustee in a deed of trust to act fairly in a sale under his power and protect the rights of parties interested in the property. 2 Jones on Mortgages (3 Ed.), sec. 1906, note; Josephena Stoffel v. Schroeder, 62 Mo. 147; Sherwood v. Saxton, 63 Mo. 78. (4) It is the settled law that it is the duty of a trustee in a deed of trust, after a sale under a prior trust deed, to apply the surplus on subsequent liens of which he has notice, in the order of their priority. Abbe v. Justus, 60 Mo. App. 300. (5) A mortgage alone is prima facie evidence of indebtedness. Janssen & Freyschlag v. Stone, 60 Mo. App. 402; Carder v. Primm, 47 Mo. App. 301; 2 Jones on Mortgages (3 Ed.), sec. 1295. (6) Where two or more creditors join in taking security for their several debts they hold as tenants in common. 17 Am. and Eng. Ency. of Law (2 Ed.), 666; 5 Am. & Eng. Ency. of Law, 956; Jones on Chattel Mortgages (2 Ed.), sec. 49. (7) Misjoinder of parties plaintiff, or defendant, can be taken advantage of only by demurrer or answer, and if objection is not so taken it is waived. Luecke v. Tredway, 45 Mo. App. 507; Jones v. Railroad, 89 Mo. App. 653.

BROADDUS, J.—Substantially the allegations of the petition are as follows:

That defendants were at all times mentioned in the petition engaged in the practice of law. That on the first day of August, 1902, one W. T. Thorp was the

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owner of 240 acres of land situated in Vernon county; that said land was encumbered with three trust deeds as follows: The first in favor of Walton Trust Company, securing a note in the sum of $2,400; the second in favor of Calvin W. Bryant, securing a note in the sum of $1,500; and the third dated the eighth of February, 1902, executed by said W. T. Thorp, securing notes in favor of plaintiffs in the sum of $1,500.97, all of said notes being dated February 8, 1902, bearing eight per cent interest and falling due June 1, 1902. That defendant John T. Birdseye was trustee in said second trust deed; that the firm of Birdseye & Harris held for collection the note secured by said second trust deed; that on or about the first day of August, 1902, said Thorp, owner of land aforesaid, entered into a contract with one Enos Simon, by which said Simon agreed to purchase said land for the price of $6,600, which said sum said Simon was ready, willing and able to pay within 25 days from date of said contract; that defendants Birdseye & Harris had notice of said contract of sale soon after the same was made, and also had notice of the third trust deed held by these plaintiffs; but said defendant, Birdseye, trustee as aforesaid, under pretense of enforcing payment of the note held by his said firm for collection, said note being secured by said second trust deed in favor of Bryant, but in reality for the purpose of cutting out the third deed of trust held by these plaintiffs, and for no other purpose, proceeded to advertise said property for sale under said second trust deed, and did on Sept. 6, 1902, sell said land at trustee's sale to said Enos Simon for the nominal consideration of $1,500, but before delivering the trustee's deed, collected from said Simon the contract price aforesaid of $6,600, of which amount the sum of $2,520 was applied to the payment of said first trust deed in favor of Walton Trust Co., and the sum of $1,630.20 was applied to the payment of said second trust deed in favor of Calvin W. Bryant, and the balance amounting to the

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sum of $2,449.30, was either retained by said Birdseye & Harris or paid over to said W. T. Thorp; that said Thorp is insolvent, and by means of and by reason of the wrongful act aforesaid of defendants, plaintiffs have been deprived of their said security and have lost their said debt, to their damage in the sum of $1,500.97, with interest thereon at eight per cent from February 8, 1902, for which sum they pray judgment, and for costs.

The evidence introduced tended to support the allegations of the petition. At the beginning of the trial defendants objected to the introduction of any evidence because the petition did not state a cause of action, but the objection was overruled, which is assigned an error.

Whatever Harris did as a member of the partnership must be attributed to the firm and not to the trustee. And whatever act Birdseye performed in the discharge of his trust was the act of the trustee and in no sense the act of the firm. It can not be controverted successfully that, as a partnership the defendants owed any duty to the plaintiff because of the fact that one of its members was the trustee in question. This is not an equitable proceeding in any sense but a suit at law for damages for the wrongful acts charged. The court very properly held that a case was not made out against the partnership but allowed the trial to proceed against the defendant Birdseye alone; and we think in that respect the court was right. It does not necessarily follow because the form of the action is somewhat in the nature of a proceeding against the partnership that no judgment can be rendered against one of the defendants and in favor of the other, if there be enough stated to show the individual liability of the one and not the other. And an inspection of the petition does show on its face that only defendant Birdseye was liable.

It is insisted at the outset that there was a mis-

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joinder of party plaintiffs, and this was true. But it is a plain provision of the statute that no judgment shall be invalidated for such a cause. Section 672, R. S. 1899; Jones v. Railroad, 89 Mo. App. 653.

The defendant asked the following instruction, number thirteen: "The court instructs the jury that what the defendant, J. B. Harris, knew or did, as the law partner of J. B. Birdseye, does not have any effect on the said Birdseye, as trustee, so that if you believe from the evidence that said Birdseye as trustee in the second deed of trust, honestly and in good faith, foreclosed said second deed of trust to enforce the payment of the note due Calvin Bryant, then your verdict should be for the defendants." This instruction should have been given for the reason already assigned, that the cause of action was substantially against defendant Birdseye and not against the partnership. It was not such information as to give notice to the trustee. It was held in Benton v. Bank, 122 Mo. 332: "When one is an officer of two corporations and they have business transactions with each other, the knowledge of the common officer can not be attributed to either corporation in a matter in which he did not represent it." The principle of the rule applies to this case. The information Harris received could not be attributed to the trustee as constructive notice to him under any conceivable theory of the law. If the information of a common officer of two corporations having business transactions with each other can not be attributed to either, we can not see how the information of a member of a firm could be attributed to another member of such firm acting in the capacity of a trustee and not in the business of the firm.

The court erred also in admitting the evidence of Thorp as to his motive in making sale of the land, as he was no party to the suit; and whatever his motive may have been, whether good or bad, had no legitimate bearing on the issue, as it was the motive of the trustee alone that was the subject of the inquiry.

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Prior to the beginning of this suit one of the plaintiffs began a separate suit against defendants which was discontinued, but while it was pending notice was given to take defendant's deposition. On being questioned he refused to answer on the ground that his evidence might form the basis for a criminal prosecution against him. On the trial this deposition was read to the jury as evidence tending to impeach him. As he testified fully and without reserve on the trial, and as there was nothing in his evidence that in the least degree would subject him to a criminal prosecution, the evidence was admissible for the purpose for which it was introduced.

There are ten different plaintiffs joined in the petition and it is alleged that they each held a separate note secured by said third deed of trust; but on the trial only eight of these notes were produced but the mortgage itself was read in evidence and described all the ten notes, which was received without objection. This was sufficient.

Other objections made seem to be without foundation.

For errors noted the cause is reversed and remanded. All concur.

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GOLDIE A. WESTON, Respondent, v. LACKAWANNA MINING CO., Appellant.

Kansas City Court of Appeals, February 15, 1904.

1. **MASTER AND SERVANT: Personal Injury: Evidence.** The evidence on the record was sufficient to send the case to the jury.

2. **———: Contributory Negligence: Evidence: Instructions.** On the evidence it is held that certain instructions relating to the contributory negligence of the plaintiff in continuing to work are held sufficient though inartificially drawn.

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3. ———: **Mines and Mining: Props: Instructions.** The widow of a miner killed by a falling roof does not have to show that timbers were necessary to support the roof and had been requested by her husband before the accident and an instruction to that effect is properly refused.

Appeal from Jasper Circuit Court.—*Hon. J. D. Perkins*, Judge.

AFFIRMED.

*McReynolds & Halliburton* for appellant.

(1) John Weston having had experience in mining and having worked in said drift three months before the accident, knew the condition of the drift and roof, and it appearing from the evidence that the falling of dirt and rock from the roof could not be prevented, it was one of the ordinary risks of the business, and risk assumed by John Weston. Bradley v. Railroad, 138 Mo. 302; Schuah v. Railroad, 106 Mo. 74; Lucy v. Oil Co., 129 Mo. 32; Harff v. Green, 168 Mo. 12; Alcorn v. Railroad, 108 Mo. 95; Watson v. Coal Co., 52 Mo. App. 366; Gleeson v. Mfg. Co., 94 Mo. 206; Boemer v. Lead Co., 69 Mo. App. 606; Holloran v. Iron & Foundry Co., 133 Mo. 470. (2) The evidence shows that just 11 days prior to injury John Weston and one Casey spent Sunday examining and trimming the roof and that Weston reported the roof safe and in good condition, and on the day of the accident stated that the roof was in good condition and the drift was as good a drift as there was in the mines; also, the evidence shows that it was the duty of the miners to watch the roof and either trim or report it to the ground foreman. From this defendant's demurrer to the evidence and also refused instruction No. 12 should have been given. Boemer v. Lead Co., 69 Mo. App. l. c. 606; Kleine v. Shoe Co., 91 Mo. App. 102; Lee v. Gas Co., 91 Mo. App. 612. (3) Defendant's instruction

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No. 11 should have been given, as a request from the miners for props should have been shown before plaintiff was allowed to recover for failure to timber said drift. R. S. 1899, sec. 8822; Adams v. Coal Co., 85 Mo. App. 494; Boemer v. Lead Co., 69 Mo. App. 601; Leslie v. Coal Co., 110 Mo. 31. (4) The peril (if any) in this drift was patent and open to the observation of any reasonable miner and for that reason plaintiff was not entitled to recover on account of the assumed risk and contributory negligence of John Weston and defendant's refused instruction No. 1 should have been given. Snyder v. Railroad, 85 Mo. App. 495; Railroad v. Austin, 72 S. W. 212; Hurst v. Railroad, 163 Mo. 309. (5) It is not the law that an employee assumes only such risks as are obviously dangerous as to threaten immediate injury. Stalzer v. Packing Co., 84 Mo. App. 565; Minnier v. Railroad, 167 Mo. 99; Herbert v. Boot & Shoe Co., 90 Mo. App. 305; Thompson v. Railroad, 86 Mo. App. 141. (6) The evidence in this case shows that the mine and drift in which John Weston was injured was run and managed according to the ordinary and usual course adopted by those mining in that character of mines; therefore it was reasonably safe within the meaning of the law, and defendant's peremptory instruction at the close of all the evidence, should have been given. Mason v. Mining Co., 82 Mo. App. 370; Kane v. Folk Co., 93 Mo. App. 215; Minnier v. Railroad, 167 Mo. 99; Wendall v. Railroad, 75 S. W. (Mo. App.) 689; Saxton v. Railroad, 72 S. W. (Mo. App.) 717. (7) Plaintiff's instruction No. 2 is wrong, for an employee does assume risks that are not so obviously dangerous as to threaten immediate injury.

*Blair & Decker* and *Gardner & Cameron* for respondent.

(1) The general rule is, that where the facts with

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respect to negligence of the parties are such that reasonable minds might differ with respect thereto, the case should go to the jury." Doyle v. Trust Company, 140 Mo. 15; Bultimaster v. St. Joseph, 70 Mo. App. 60; O'Mellia v. Railroad, 115 Mo. 205. (2) The law in this State is that the duty of the master is a continuous one. Zellers v. Water and Light Co., 92 Mo. App. 109; Wendler v. Furniture Co., 165 Mo. 527; Pauck v. Beef Co., 159 Mo. 467. (3) The third point made by defendant is that defendant's instruction No. 11 should have been given, requiring plaintiff to show a request for props before a recovery could be had for failure to timber the drift, and cites a number of cases to support its contention. We suppose defendant refers to instruction No. 7, as No. 11 was given as asked. But in answer to defendant's contention we will again cite Doyle v. Trust Company, 140 Mo. 15. (4) The law has long been settled in this State that a servant assumes all the risks incident to his employment; but does not assume those caused by the negligence of the master. Sorder v. Railroad, 100 Mo. 682; Mahengos v. Railroad, 108 Mo. 201; Settle v. Railroad, 127 Mo. 336; Pauck v. Beef Co., 159 Mo. 467; Wendler v. Furniture Co., 165 Mo. 527; Curtis v. McNair, S. W. (April 22, 1903), 167. (5) The fifth point made by the defendant is "that the drift in which John Weston was injured was run and managed according to the ordinary and usual course adopted by those mining in that character of mines, and therefore it was reasonably safe within the meaning of the law, and defendant's peremptory instruction at the close of all the evidence should have been given." The evidence shows that the drift was in shell flint and soapstone ground, and selvidge and black mud seams running through it both ways. That air causes it to slack and fall; that shooting loosens it and causes it to fall; that such a roof requires constant watching—that such a roof should be examined



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after each shot. Doyle v. Trust Co., 140 Mo. 15; Fulso v. Railroad, 45 Mo. 541; Huhn v. Railroad, 92 Mo. 440. (6) And further, if it was an omission on the part of plaintiff to instruct the jury that Weston assumed the ordinary risks of his employment this omission was cured by the instruction No. 2, given on behalf of defendant, for it is settled law in this State that all instructions given must be considered and construed together. Owens v. Railroad, 95 Mo. 181; Daugherty v. Railroad, 97 Mo. 661; Spillane v. Railroad, 111 Mo. 564; Budoin v. Trinton, 116 Mo. 372; Meadoms v. Ins. Co., 129 Mo. 97; Gordon v. Burns, 153 Mo. 232; Anderson v. Railroad, 161 Mo. 411; Blaydes v. Adams, 35 Mo. App. 531; Ephlance v. Railroad, 57 Mo. App. 160; Keer v. Cusenlasf, 69 Mo. App. 224; Francis v. Railroad, 127 Mo. 675; Hogan v. Dawson, 134 Mo. 591; Christian v. Ins. Co., 143 Mo. 468; Sprague v. Sea, 152 Mo. 339; Guntley v. Stead, 77 Mo. App. 163.

SMITH, P. J.—Action to recover damages for personal injuries resulting in death.

The plaintiff is the wife of John Weston, deceased. In the petition it is alleged that said John Weston was employed as a miner by defendant at its mine and as such miner it was the duty of said John Weston to go down in the drifts of defendant's said mine and to work therein in assisting to get out ores; that it was the duty of said defendant to furnish the said John Weston a reasonably safe place in which to work and to keep said mine and drift where said Weston was required to work in such condition that he and the other men working therein could work with reasonable safety. But plaintiff says that defendant, wholly failing in its duty in that regard, carelessly and negligently failed to inspect and examine the roof of the drift wherein said Weston was working in a proper manner and carelessly and negligently failed to trim said roof so as to work out loose boulders

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and rock therein and carelessly and negligently failed to support the roof of said drift with timbers and props so as to prevent the same from falling and caving in on said Weston while at work, and to prevent rock, earth and boulders from falling upon him and carelessly and negligently failed to adopt any means to render said roof reasonably safe, but, on the contrary allowed said roof to become and remain in a dangerous and defective condition by reason of boulders and rock therein becoming loosened and remaining loosened and liable to fall; and that such dangerous and defective condition of the said roof was known to defendant or could have been known by it by the exercise of reasonable care on its part.

The defenses pleaded in the answer were the assumption of the risk and contributory negligence.

There was a trial wherein the plaintiff had judgment from which the defendant appealed. The defendant by its appeal has raised the question whether or not the trial court erred in its action submitting the case to the jury. After a rather careful examination and analysis of the evidence, we have concluded that the action of the court in that respect is not subject to any just criticism. The allegation of negligence contained in the petition and hereinbefore set out were supported by evidence which we think was sufficiently ample to carry the case to the jury.

The court gave fifteen instructions, six of which were for plaintiff and nine for defendant, which covered very fully every issue in the case. The defendant however insists that it was error to give the plaintiff's second which told the jury that, "if you find from the evidence that the defendant carelessly and negligently allowed the roof of said drift to become and remain in a dangerous and defective condition by reason of boulders and rock in said roof becoming loosened and remaining loosened and liable to fall and that said Weston before his injury knew of such condition of the roof of

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said drift and that there was some risk or danger of boulders and rock falling down and upon him from said roof while engaged in the duties of his employment in said drift; yet, if you find from the evidence that such condition of said roof and the dangers arising therefrom were not such as to threaten immediate injury to said Weston while in defendant's service in the discharge of the duties of his employment and were not such that a person of ordinary prudence, while exercising care and caution, would not have remained in defendant's service and discharged the duties of his employment, then, the fact alone that said Weston continued in defendant's service under the circumstances, will not of itself defeat this action."

This instruction is exceedingly clumsy and inartistic in enunciation. Doubtless, when read in connection with the defendant's of like number the two together sufficiently embody the rule and the exception to it. This latter declared, "a man who works in a mine assumes the ordinary risks accompanying such work," etc.

The plaintiff's first and second instructions, though somewhat awkward in expression fairly stated the exception which is to the effect that the servant assumed the ordinary risks of his employment. In Smith v. Coal Co., 75 Mo. App. l. c. 181, it was said: "Mere knowledge that the entry (drift) was defective and that risk was to be incurred in its use was not, as a matter of law, sufficient to defeat the plaintiff's action, if the danger was not such as to threaten immediate injury, or if it was reasonable to suppose the entry might be safely used by the exercise of care." In Stoddard v. Railroad, 65 Mo. l. c. 521, it was said that "in the case of Conroy v. Iron Works, 62 Mo. 39, it was held that when the instrumentality with which the servant is required to serve, is so glaringly defective that a man of cf common prudence or sense would not use it, the master could not be held responsible for damages result-

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ing from it. In such a case the servant would be guilty of heedlessly and recklessly exposing himself to danger, and would have to abide the consequences.'' The opinion then continues, ''but when the servant incurs the risk of machinery, which, though dangerous, is not so much so as to threaten immediate injury, or when it is reasonable to suppose that it may be safely used with great caution or skill, a different rule prevails.'' In Thompson v. Railroad, 86 Mo. App. l. c. 149, will be found cited most of the cases from our reports where this rule and its exception has been recognized. To these may be added Minnier v. Railroad, 167 Mo. 99.

The rule of practice is that if instructions given for both plaintiff and defendant when considered in their entirety fairly and correctly express the law applicable to the case, and if whatever omissions those given for plaintiff may disclose are fully supplied by those of defendant, they—the instructions—will be regarded as invulnerable. Gordon v. Burris, 153 Mo. l. c. 232, and cases there cited.

The defendant further contends that the plaintiff's said second instruction is repugnant in expression to its fifth which declared if the deceased was a miner of experience (which the evidence, we think, shows was not the fact) and could see and know the condition of the drift, and knew the danger in working in said drift as well as the ground boss, and with such knowledge, without complaint to defendant, and without any assurance from them of its safety, he assumed whatever risk there was in working said drift from any defect in the roof or from want of timbers. ''The neglect of the duty by the master with the servant's knowledge, does not convert the danger arising therefrom into a risk of the employment assumed by the servant. In such case the servant's knowledge of the condition is a fact to be considered under the plea of contributory negligence, and under that head it precludes a recovery only when the danger is so glaring that a man of ordi-

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nary prudence, under the circumstances, would have refused to do his master's bidding." Wendler v. House Fur. Co., 165 Mo. l. c. 536-37; Pauck v. Beef Co., 159 Mo. 467. It is thus made apparent that the defendant's instruction does not accurately express the law and therefore if it be inconsistent with the plaintiff's second, which we think does accurately express the law, that the giving of the former at defendant's request was not an error of which it can complain.

The defendant requested an instruction (number seven) which declared that before plaintiff could recover it devolved upon her to show by a preponderance of the evidence that timbers were necessary to support the roof of the mine and that such timbers had been requested or demanded by the miners working therein, "and unless plaintiff has so shown she can not recover on account of defendant not timbering said drift." In the light of our ruling in Bowerman v. Lackwanna Mining Co., 98 Mo. App. 308, it is manifest that the refusal of that instruction was not error.

There was sufficient evidence to warrant a submission of the case. The numerous instructions given, as already stated, covered every possible issue. We have been unable to discover anything in the record that would authorize a disturbance of the judgment, which must therefore be affirmed. All concur.

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L. A. MOORMAN, Respondent, v. THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Appellant.

**Kansas City Court of Appeals, February 15, 1904.**

1. **TRIAL PRACTICE: Demurrer to Evidence: Negligence.** If the defendant's evidence makes out a case of actionable negligence he is entitled to go to the jury notwithstanding the countervailing evidence of the defendant.

2. **PASSENGER CARRIERS: Stopping and Starting Train: Evidence.** A railway passenger carrier must allow its passengers a reasonable time to leave the train after it stops and exercises the highest degree of care so as not to suddenly jerk and jar the alighting passengers by starting its train.

3. ———: ———: ———. The evidence is reviewed and held sufficient to send to the jury the question of defendant's negligence in jerking its train under the rule that where a vehicle is under the management of the carrier and the accident is such as under the ordinary course of things does not happen, then negligence may be inferred in the absence of an explanation.

Appeal from Linn Circuit Court.—*Hon. Jno. P. Butler*, Judge.

AFFIRMED.

*Gardiner Lathrop, Samuel W. Moore, T. P. Burns* and *J. P. Gilmore* for appellant.

(1) The alleged movement of the car claimed by plaintiff to have caused the accident resulting in his injury was necessary and incident to the usual, ordinary and proper operation and management of defendant's train, and plaintiff can not, therefore, recover on account thereof. 4 Elliott on Railroads, 2476, sec. 1589; Fetter on Carriers, sec. 81; Saxton v. Railway, 72 S. W.

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717; Wait v. Railway, 165 Mo. 612; Bartley v. Railway, 148 Mo. 124; Hite v. Railway, 130 Mo. 132; Pryor v. Railway, 85 Mo. App. 367; Guffey v. Railway, 53 Mo. App. 462; Portuchek v. Railroad, 74 S. W. 368; Erwin v. Railway, 94 Mo. App. 289; Olds v. Railroad, 172 Mass. 73; Heyward v. Railroad, 169 Mass. 466; Stewart v. Railroad, 146 Mass. 605; Choate v. Railway, 90 Tex. 82; Railroad v. Morris (Ky.), 62 S. W. 1012; Saunders v. Railway, 6 S. Dak. 40; Herstine v. Railroad, 151 Pa. St. 244; Stager v. Railway, 119 Pa. St. 270; Porter v. Railway, 80 Mich. 156; DeSoucey v. Railway, 15 N. Y. Supp. 108; Black v. Railroad, 2 App. Div. (N. Y.) 387; Bradley v. Railroad, 90 Hun 416; Cassidy v. Railroad, 29 N. Y. Supp. 724; Railroad v. Vinson (Ky.), 74 S. W. 671. (2) Defendant was pursuing its usual and ordinary course in the operation and management of its train at the time of the accident, which was a proper course. No ordinarily prudent man would or could have foreseen the danger or position in which plaintiff placed himself, and the happening of the injury, therefore, was a mere accident, for which defendant can not be held liable. Saxton v. Railway, 72 S. W. 717; Young v. Railway, 93 Mo. App. 267; Holt v. Railway, 84 Mo. App. 443; Hysell v. Swift, 78 Mo. App. 39; Guffey v. Railway, 53 Mo. App. 462; Brewing Assn. v. Talbot, 141 Mo. 674; Fuchs v. St. Louis, 167 Mo. 720; and cases cited. (3) Plaintiff was guilty of contributory negligence and is not, therefore, entitled to recover. Erwin v. Railway, 94 Mo. App. 289; Railway v. Overall. 82 Tex. 247; Guthman v. Railway, 53 N. Y. Supp. 139; Harrison v. Railway, 89 Mo. 236; Ashbrook v. Railway, 18 Mo. App. 290; cases cited under point 1.

*West & Bresnehen* for respondent.

(1) The sudden movement of a passenger train, made without warning to passengers, when they are alighting, is negligence. Sauter v. Railroad, 66 N. Y.

50; Keating v. Railroad, 49 N. Y. 673; Railroad v. Revalee, 1 Am. Neg. Rep. (Ind.) 427; Distler v. Railroad, 151 N. Y. 424; Railway v. Rowland, 1 Am. Neg. Rep. (Tex.) 363; Railroad v. Moore, 6 Am. Neg. Rep. (Ga.) 451; Devine v. Railroad, 1 Am. Neg. Rep. (Iowa) 41; Appleby v. Railroad, 9 Am. Neg. Rep. 582; Railway v. Elliott, 61 S. W. 726; 3 Thompson on Negligence, secs. 3002-3032. (2) The above cited cases are sufficient to show the general doctrine in cases like the case at bar. The appellate courts of this State are in line with the general doctrine as above stated. Madden v. Railway, 50 Mo. App. 666; Barth v. Railway, 142 Mo. 535; Smith v. Railway, 108 Mo. 243; Leslie v. Railway, 88 Mo. 50; Straus v. Railroad, 75 Mo. 185; Swigert v. Railroad, 75 Mo. 475; Clotworthy v. Railroad, 80 Mo. 220; Bucher v. Railroad, 98 N. Y. cited with approval in Fulks v. Railway, 111 Mo. 335; Condy v. Railway, 13 Mo. App. 587. (3) Appellant was not pursuing its usual and ordinary course in the operation and management of its train, at the time plaintiff was injured, but an unusual, negligent and careless course. The sudden starting of a passenger train without warning, while passengers are alighting, and before they have had sufficient time to get off, is an act of negligence likely to result in injury to passengers. The fact that the employees of the carrier can not anticipate the particular character of the injury which may be sustained, will not relieve the carrier from liability. Sauter v. Railroad, 66 N. Y. 50; Keating v. Railroad, 49 N. Y. 673; Railroad v. Revalee, 1 Am. Neg. Rep. 427; Distler v. Railroad, 151 N. Y. 424; Railway v. Rowland, 1 Am. Neg. Rep. 363; Barth v. Railway, 142 Mo. 535; Smith v. Railway, 108 Mo. 243; Leslie v. Railway, 88 Mo. 185; Swigert v. Railroad, 75 Mo. 475; Clotworthy v. Railroad, 80 Mo. 220; Railroad v. Moore, 6 Am. Neg. Rep. 451; Devine v. Railroad, 1 Am. Neg. Rep. (Iowa) 41; Madden v. Railway, 50 Mo. App. 666; Condy v. Railway, 13 Mo. App. 587.

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SMITH, P. J.—Action to recover damages for personal injuries. The defendant's railway line extends from Marceline to Bucklin, over which it runs and operates its various kinds of trains. The plaintiff, desiring to go from the former to the latter place, for that purpose entered a car of one of the defendant's passenger trains at such former place where he was accepted as a passenger. The petition alleges, "that after said train upon which plaintiff was so being carried as aforesaid had reached the said town of Bucklin and when said train was within a short distance of defendant's said depot at Bucklin, and while said train was still in motion, and while said train was being slowed up for the purpose of stopping at defendant's said depot at Bucklin, the defendant's servants and agents, then and there in charge and control of said train, negligently and carelessly called said Bucklin station, and so then and there negligently and carelessly invited and directed the plaintiff (and the other passengers on said train) to prepare and make ready to get off of said train at its Bucklin depot. Plaintiff further states that after the defendant's said servants and agents so in charge and control of said train had so negligently and carelessly called said Bucklin station as aforesaid, and had so negligently and carelessly invited and directed the plaintiff (and the other passengers on said train) to prepare and make ready to get off of said train at its Bucklin depot, and before said train had come to a full stop, and while it was being run at a very low rate of speed, the plaintiff in the exercise of due care and caution on his part, and as he was so negligently and carelessly directed by defendant's servants and agents so in charge of said train, prepared and made ready to get off of said train at the said Bucklin depot, by raising from his seat in said car and by stepping into the aisle between the rows of seats in said car. Plaintiff further states that while plaintiff was so standing in the said aisle of the said car, so prepared and ready to get off of said car and while

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plaintiff was in the exercise of due care and caution on his part, and after said train had come to a full stop, or had almost and about come to a full stop, at or near the depot platform at said Bucklin depot, and before the plaintiff had had a reasonable or sufficient time to get off of said train, the defendant's servants and agents so in charge of said train suddenly, negligently and carelessly and without any warning or notice to the plaintiff caused said train to be suddenly, rapidly and violently started and jerked forward, whereby plaintiff was thrown with great force and violence upon and against the small end or point of the handle of an umbrella, which umbrella plaintiff then and there held in his hand and whereby the other or larger end of said umbrella was thrust against one of the seats of said car, and whereby plaintiff's body was thrown with such great force and violence against the small end or point of said umbrella handle as to cause and produce a rupture and hernia of the plaintiff on the right side of plaintiff's abdomen in the inguinal region."

The answer was a general denial and the plea of contributory negligence. There was a trial resulting in judgment for plaintiff and defendant appealed.

At the close of the plaintiff's evidence and at the conclusion of all the evidence, the defendant requested an instruction in the nature of a demurrer thereto, which was by the court denied. The vital question brought before us by the appeal is whether or not on the evidence adduced the plaintiff was entitled to a submission of the case to the jury.

It is the well-settled law of this State that a demurrer to the evidence admits every fact which the jury might infer if it were before them, and if, taken as true, it makes out a case of actionable negligence the plaintiff is entitled to go to the jury notwithstanding the countervailing evidence of defendant. Barth v. Railway, 142 Mo. l. c. 549; Rem v. Railway, 100 Mo. 228; Franke v. St. Louis, 110 Mo. 516.

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The plaintiff's testimony was to the effect that after the purchase of his ticket he entered defendant's train and occupied a seat in the rear end of the second coach from the engine; that as the train approached Bucklin one of defendant's trainmen called out "Bucklin!" Just what occurred next after this will be best understood by reference to the following extracts taken from the plaintiff's testimony:

"Q. After the station was called, state whether or not the train slowed up? A. The train slowed up when it approached the station. Q. Tell the jury what, if anything, occurred after the train began to slow up? A. Well, the train began slowing up and I thought the train had stopped. My impression is that it stopped still and at that time I arose from my seat; and the gentleman sitting by me arose from his seat, and picked up, I think he had baggage with him, and stepped in the aisle and I arose and picked up my suit case and was standing just at the end of the seat in front of the one in which I sat. Q. State whether or not those two seats had been turned toward each other? A. They were. They were reversed so the two seats were facing each other? Q. So, when you were sitting in the train, you were facing north, the direction the train was going? A. Yes, sir. Q. After you picked up your grip or valise, what did you do? A. I stepped in the aisle at the end of the seat in front of me and reached for my umbrella. The umbrella was lying parallel with the seat, with the point toward the aisle. I picked up the umbrella and as I started with it, the train lurched forward and threw me backward and that end of my umbrella caught on the back of the seat on which I was sitting, and my body came against the point of the umbrella. Q. You say the train lurched forward, tell the jury how far the train went forward after that jerk or by that lurch? A. I do not know just how far the train went forward; but I think it went

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about the length of a coach, as I noticed at the depot the north end of the coach was about opposite to the south end of the depot. Q. When was it opposite the south end, when it finally stopped or when it first stopped? A. When it first stopped. Q. Where was it when there was a final stop? A. When I came out of the car, I came out of the south end which was about opposite the south end of the depot. Q. So the distance it went forward was about the length of the coach? A. I think so, or about that. Q. Just tell the jury whether or not the train had stopped or was standing still at the time you picked up your umbrella? A. That is my opinion, that it was standing still. Q. If it was not still, how fast was it going? A. Well, it was moving very slowly. Q. Now, tell the jury just where the point of the umbrella struck your body? A. Well, I can show the jury better standing. As I raised the umbrella, just as I raised with the umbrella, then the train moved forward; and the umbrella, I fell forward, like this, and that end of the umbrella struck the end of the seat and the point struck me right there (indicating), and as I doubled over, it punched down like that and there is where the injury is. Q. What caused you to be thrown forward? A. The sudden movement of the train. Q. When you speak of being thrown forward, you mean you were thrown which direction? A. South, toward the rear of the car. Q. Tell the jury what it was that the other end of the umbrella struck against? A. Against the back of the seat on which I had been sitting. Q. At the time you stepped out in the aisle, as I understand you before you got out in the aisle you took up your dress suit case? A. Yes, sir. Q. And after you got out in the aisle, you reached over and took up your umbrella? A. Yes, sir. Q. And during all this time the train was slowly moving toward the station? A. The train had stopped at the time I picked up my dress suit case. Q. Look and see if you answered the top question, read it? A.

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'Now, when you got up and stepped out in the aisle and turned around and picked up your umbrella, during some of that time the train was moving, in other words, the train was moving while you did that it took you some little time.' Q. Is that correct? A. Yes, sir, it took some little time; but I think the train was not moving at that time. Q. Now, wasn't this question asked by Mr. Burns: 'Now, Professor, you are not sure whether the train stopped or not before you got hurt? A. Not absolutely certain that it stopped still.' Is that correct? A. Yes, sir. Q. Was this question asked you: 'You are sure it slowed up? A. Yes, sir.' A. Yes, sir. Q. Was this question asked you: 'But don't know whether it came to a full stop or not? A. No, sir, I do not.' Is that correct? A. That is correct. Q. Was this question asked you in your deposition: 'Now, the distance from where it slowed up and where you supposed it had stopped to where it finally did stop and the passengers got off was about the length of one car? A. About that.' Now, is that correct? A. Yes, sir. Q. The brakeman had called this station at Bucklin when the train was within about one hundred yards of the station? A. About that. Q. And the train began to slow down, and when you got up in the aisle and gathered up your suit case and your umbrella, the north end of the car, the end of the car where you were, was about the south end of the depot? A. Yes, sir. Q. And when the train came to a full stop and you alighted, the south end of the car was up at the depot? A. It was."

The plaintiff occupied a seat near the hind end of the car. If, after the trainman had called out Bucklin and the train had come to a stop, or, so nearly so that its movement was barely perceptible, and the plaintiff had left his seat and was standing in the aisle of the car with his suit case in hand, just preparatory to making his departure, and had reached down and grasped his umbrella, and was raising it the train suddenly

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lurched forward, whereby plaintiff was thrown toward the hind end of the car, and the handle end of his umbrella faced against the back of the seat—then in front of him—and the other end—the point—against his abdomen, as the plaintiff testified, then the defendant as guilty of actionable negligence. It sufficiently appears from the plaintiff's evidence that after the train had stopped it was given a lurch, the suddenness and violence of which was sufficient to throw plaintiff forward, one end of his umbrella striking the back of a seat and he the other, and this, it was proved, caused the injury of which complaint is made. The sudden lurching of the train forward was a negligent act and if, as the evidence of the plaintiff tends to prove was the fact, it was the direct and proximate cause of the injury, there was liability.

The plaintiff having been accepted as a passenger on its train, it was bound to exercise the highest degree of care of a prudent person under similar circumstances for his safety and to be held to a strict responsibility therefor. In Barth v. Railway, 142 Mo. l. c. 550, it was said that, "a railway passenger carrier is bound to allow its passengers reasonable time to enter and leave its cars, and while it may start before a passenger has been seated, it must exercise the highest degree of care that a prudent and cautious person would use and exercise under similar circumstances in starting its cars, so as not to suddenly jerk or jar him, and thereby injure him." Dougherty v. Railway, 9 Mo. App. 478. And of course the same rule is applicable where a train has stopped and a passenger is in the act of leaving one of its coaches.

The contention of the defendant is that it is shown by the evidence that the lurch was occasioned by the release of the air brakes and that it is usual and ordinary and can not be avoided by the most careful management of its passenger trains. But we do not so understand the evidence. The testimony of the defendant's

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conductor was that the lurch or quiver of a passenger train which is caused by the release of the air brakes has a tendency to throw a person toward the *front* instead of the *rear* of the train. Ramsdell, the defendant's car inspector, testified that when the air brakes are released the cars settle back from the engine just as they stop.

The plaintiff's testimony was that the lurch was forward and that it proceeded a car length before it again came to a full stop. There is nothing in the evidence to authorize the inference that the sudden forward lurch of the train to the length of a car was caused by the release of the air brakes, or, if so, that the lurch was such as was usual and ordinary, and could not be avoided by the most careful management of passenger trains. As has been already said, the usual and ordinary lurch resulting from the release of the air brakes, is to impart to the cars a backward movement from the engine which would tend to throw a standing passenger forwards towards the engine. It therefore becomes at once obvious that the forward lurch, which occasioned the plaintiff's injury, did not result from the release of the air brakes, but from some other cause, probably that of moving the train by the negligent use of the motive power. The evidence that the release of the air brakes of a train usually and ordinarily imparts a backward lurch or settling of the cars does not tend to show that the accident did not arise for want of care on the part of the defendant.

In Dougherty v. Railway, 81 Mo. 325, it was said: "Where the vehicle or conveyance is shown to be under the control or management of the carrier or his servants, and the accident is such as under an ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by defendant, that the accident arose for want of care." And no good reason is seen why the application of this rule may not be in-

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voked in resolving the question now before us. We are unable to discover anything in the evidence to warrant the defendant's assumption that the forward movement of the car, which the plaintiff testified as causing his injury, was necessary and incident to the usual and proper operation and management of defendant's train, and therefore we think the numerous authorities cited and relied on by it are without application.

Nor do we think we are authorized to hold as a matter of law that because the plaintiff picked up his umbrella by taking hold of it near the middle instead of by the handle, so that in that way he brought the point around in front of his body that he was thereby guilty of contributory negligence. When this was done the train was either standing still or was moving so slowly as not to be noticeable. It was at the station platform and the plaintiff had arisen from his seat and was standing in the aisle preparatory to leaving the car when, without any warning, the car suddenly started forward. The plaintiff had a right to presume that it would remain stationary, or nearly so, until after a reasonable time for him to leave the car had elapsed. The case was we think one for the jury.

The court gave twenty-one instructions, five for plaintiff and the remainder for defendant. They presented for the consideration of the jury every conceivable phase of the case. It is not contended that there was any error in the action of the court in that regard.

The verdict is therefore conclusive on us and the judgment must be affirmed. All concur.



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## BANK OF SENECA, Appellant, v. FIRST NATL. BANK OF CARTHAGE, Respondent.

Kansas City Court of Appeals, February 15, 1904.

1. **BANKS AND BANKING: Letter of Credit: Exhaustion of.** Whether a person who advances money on a letter of credit the limit of which has already been exhausted without his knowledge, can recover of the writer, *quaere*.

2. ——: ——: **Claims Upon: Scienter.** A party seeking reimbursement against the writer of a letter of credit must show that he acted on the faith of the letter; and where he had no knowledge of the letter his claim must fail.

3. ——: ——: ——: ——. Defendant bank issued its letter of credit for $1,000. Plaintiff bank on the faith of the letter paid the holder's checks to the amount of $500 at one time. Thereafter a third bank paid checks of the holder without any knowledge of the letter and the defendant bank took them up and charged them against the letter. Thereafter plaintiff bank paid other checks of the holders for $500 which defendant bank refused to take up since the letter had been exhausted by the checks of the third bank. *Held*, it was liable to plaintiff for the latter checks.

Appeal from Jasper Circuit Court.—*Hon. Hugh Dabbs*, Judge.

REVERSED AND REMANDED (*with directions*).

*Geo. Hubbert* for appellant, filed extended argument.

*E. O. Brown*, *Geo. W. Crowder* and *Howard Gray* for respondent.

(1) A person making advances on the faith of a letter of credit which authorizes the bearer to draw for a limited amount only, is bound to make the necessary inquiries to learn that such amount has not been ex-

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hausted; and if, without making such inquiry he advances money on the faith of a check drawn according to the terms of the letter, he can not recover where the person in whose favor it is written has already drawn for the full amount specified. Or, to state it differently, the burden rests upon the person making such advances to determine at his peril whether the amount for which the letter of credit is given has been exhausted. Ranger v. Sargent, 36 Tex. 26; Nisbitt v. Galbraith, 3 La. Ann. 690; 18 Am. and Eng. Ency. Law (2 Ed.), 835; 2 Daniel on Neg. Instruments (4 Ed.), 818. (2) The instructions asked by plaintiff and refused by the court do not correctly express the rule of law applicable to this case, and, therefore, were properly refused. They made the defendant liable for the advances made by plaintiff regardless of the fact that the letter of credit had already been drawn on to the full amount specified therein.

ELLISON, J.—The defendant bank issued to H. G. Tanger and delivered to his agent, George W. Hawk, the following letter of credit:

("Letter of Credit.)

"First National Bank, Capital Stock $100,000.

"Carthage Mo., July 8, 1901.

"*To Whom it May Concern*:

"We will pay checks signed H. G. Tanger by the bearer, Geo. W. Hawk, to the amount of one thousand dollars, any checks paid indorse on back of this letter. Mr. Hawk's signature is below.

"GEO. W. HAWK. V. A. WALLACE, Vice Pres."

Said letter was indorsed on the back as follows:

| | | | |
|---|---|---|---|
| "7-17—10 checks | .............. | $500.25 | |
| 7-25— 1 check, J. G. Johnson | ... | 235.00 | Seneca, Mo. |
| 7-25— 1 check, J. D. Gallemore | . | 240.00 | " " |

| | | | | |
|---|---|---|---|---|
| 7-25— | 1 check, G. W. Hawk.... | 24.75 | " | " |
| | | "$1,000.00." | | |

Hawk was engaged in going over the country buying mules for Tanger and he was given the letter of credit to facilitate that business. After receiving the letter on July 8th, he went into the adjoining county of Newton and on July 17th he drew and negotiated ten checks aggregating $500.25, which were duly indorsed on the back of the letter and paid by defendant. Then, on July 25th, he presented the letter to the plaintiff bank and on the faith thereof plaintiff allowed him to draw and negotiate to it, three checks on defendant, one for $235, one for $240, and one for $24.75, aggregating $499.75, being balance of the amount limited in the letter. These were separately indorsed on the back of the letter. The smallest of these was for expense money and the other two were for mules purchased. The defendant bank refused payment of these checks on the ground that before they were negotiated to plaintiff, Hawk had exhausted the sum limited in the letter by checks to other parties, which had been duly paid by defendant.

It appears that before negotiating these checks, Hawk, leaving the letter behind, went into another county and there bought mules and, on July 10 and 13, negotiated checks to a bank at Pineville in that county aggregating $389.80. These checks were negotiated to that bank without Hawk exhibiting the letter of credit and with no knowledge on the part of that bank that there was a letter of credit. It was these last checks which defendant bank paid; and these with the $500.25, which it had before paid, made a total payment of $890.05, and lacked $109.95 of being the amount named in the letter.

On these facts the trial court took the view that the checks negotiated to the bank at Pineville and paid by defendant went to the discharge of the letter of credit,

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and rendered judgment for the plaintiff for its smallest check of $24.75. The reason, as we gather it, for rendering judgment for only $24.75, when the letter after allowing for the checks at Pineville lacked $109.95 of being exhausted, was that that sum would not pay either of the other of plaintiff's checks in full.

The parties have discussed at length the question whether a person who has advanced money on the faith of a letter of credit, the limit of which the holder had already exhausted by negotiations with others without that person's knowledge, can recover of the writer. Putting aside considerations of equity, which sometimes arise, and looking upon it as a legal question, there is strong authority for saying that he can not. Ranger v. Sargent, 36 Tex. 26; Roman v. Serna, 40 Tex. 306. Though we need not say.

For any such question is excluded from this case by the facts preserved in the record. The letter being addressed to "whom it may concern;" and being intended for use with different persons at different times and at various places, was a general letter of credit, and it was what has been aptly termed a circulating promise to pay Tanger's checks, signed by Hawk, up to the amount of $1,000. But it is a fundamental rule governing this sort of commercial paper that no one has any claim because of it, against the writer, unless he knew of its existence and advanced his money on the faith of it. McClung v. Trevor, 4 Ohio 196; Pollock v. Helm, 54 Miss. 1; Grant v. Naylor, 4 Cranch. 224; Sherwin v. Brigham, 37 Ohio St. 137; Birkhead v. Brown, 5 Hill 643; Russell v. Wiggin, 2 Story 235-241; Union Bank v. Coster, 3 Comstock 203; Blecker v. Hyde, 3 McLean 279. That the party making claim of reimbursement against the writer must show that he acted on the faith of the letter, is a requisite that appears in all writing upon this and kindred subjects. It so appears in adjudicated cases and is accepted, as of course, by text-writers. See 2 Daniel on Neg. Inst., secs. 1790-1798; Coolidge v. Pay-

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son, 2 Wheat. 264; Schemmelpennick v. Bayard, 1 Peters 264; Boyce v. Edwards, 4 Peters 111.

The liability of a writer of a letter of credit is founded on the simple law of contracts where the minds of the parties must meet in the common purpose. The act of the writer is an offer, or request, or proposition, and the act of him who furnishes the money is an acceptance. So it is understood that a general letter of credit is considered as addressed to whomsoever will act upon it and when acted upon, the contract is made up upon which the writer may be held liable. Necessarily, where one furnishes another money without knowledge that such other has a letter of credit, he is a stranger to the letter; and when he comes to set it up as the foundation upon which to recover against the writer, he should be regarded as an interloper without a shadow of right.

By these remarks we aim to demonstrate that when the bank at Pineville, without sight or knowledge of the defendant's letter, paid Tanger's checks drawn on the defendant bank, that act, necessarily, was not based on the letter, and in consequence, no contractual relation arose between it and the defendant bank. And when the defendant bank paid the checks to the Pineville bank, it was merely the consummation of an ordinary transaction wholly disconnected and apart from the letter. The sum thus paid could not be applied towards extinguishing the amount named in the letter. The sum so paid only became a debt owing from Tanger to the defendant and had no more to do with the letter than any other debt he might have owed to it. That the payment of the Pineville checks could have no connection with the letter is apparent by the suggestion that if the defendant bank had not paid those checks and had asked that the Pineville bank and this plaintiff interplead for the money, which would have prevailed; the plaintiff, who relied upon the letter and complied with it, or the Pineville bank who knew nothing of its existence?

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It can make no difference that the defendant may have thought and assumed that the Pineville checks were cashed by that bank on the faith of the letter it gave into Hawk's possession. If Hawk acted irregularly and without authority in dealing with the Pineville bank, such act ought not to be allowed to injure the plaintiff bank, where his act was regular and within authority. If Hawk's act must harm one of two innocent parties, it should fall on the one who put him in position to do the harm.

From these considerations it follows that the defense wholly failed and that plaintiff should have had judgment in the trial court for the whole sum it advanced. The judgment is therefore reversed and the cause remanded with directions to so enter it. All concur.

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By J. T. WHITE.

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1. **Discharge: Administrator De Bonis Non.** When an administrator has fully administered an estate and been discharged whether upon the discovery of additional assets, an administrator *de bonis non* may be appointed, *quaere*. Byers v. Weeks, 72.

2. **Partnership Estate: Administrator: Statute.** Under the statute a partnership estate can only be administered by the surviving partner or the administrator of the deceased partner. Ib.

3. **Descent of Personal Property: Title: Heir: Action.** The rule that personal property descends to the administrator is an invention for the convenience and benefit of creditors and his title is only a qualified one, the heir at all times having an equity in such property, and when the administrator fails to administer on the partnership estate and is discharged the heir may maintain an action in equity therefor. Ib.

4. **Unavailable Asset.** In order that an executor may be entitled to credit on his final settlement for the amount of a note as an unavailable asset, he must make a reasonable showing that it could not be collected. Hallway v. Eckler, 585.

5. **Executor's Negligence.** Where a note was due an estate from the wife of one of two executors, for money loaned her by the testator, and the evidence tended to show that the husband, the executor, received the proceeds of the note as well as inheritances received by her from other estates, and the other executor showed no diligence to protect the estate, an order charging the executors with the amount of the note was proper, although she was wholly insolvent. Ib.

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ADVANCEMENT.

1. **Declarations of Testator.** Where a parent takes a promissory note payable to himself from his child, his declarations at the time of the transaction, or subsequent thereto, are admissible for the purpose of showing that the note was taken as a mere memorandum of an advancement. Strode v. Beall, 495.

2. **Same.** A testator provided in a clause of his will that he made no charge for advancements unless a memorandum to that effect be found; he left notes signed by a son-in-law, payable to himself, which he had negotiated, giving the son-in-law the proceeds, and afterwards had taken up, and a memorandum was found among his papers, in which he stated that the notes should be charged to the maker's wife, testator's daughter, as an advancement. *Held*, the notes were receipts for advancements. Ib.

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**Changing Cause of Action: Substituting One Party Defendant for Another.** In a suit against the "Chicago and Alton *Railroad* Company," a corporation, the petition stated a cause of action against it, and that corporation answered to the suit. The plaintiff, on motion, was permitted to amend its petition, the original summons and the return of the sheriff, showing that the defendant was the "Chicago & Alton *Railway* Company," another corporation. The substituted defendant, after an unavailing motion to strike out its name as defendant in the petition, writ and return, filed an answer to the amended petition, containing a general denial and plea in abatement to the jurisdiction of the court. *Held*, that the amendment substituting one defendant for another was the substitution of a different cause of action from that set forth in the original petition and should not have been permitted without proof of the averments of plaintiff's motion to amend, showing that the last named corporation was the one served with process. Jordan v. Railroad, 446.

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**Trespass: Evidence.** In an action for damages sustained by plaintiff from the overrunning of his premises by defendant's cattle, which escaped from defendant's farm, adjoining, the introduction by plaintiff of defendant's deed to the latter's farm, to

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show the extent of defendant's possession, was not reversible error. Young v. Prentice, 563.

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**Affidavit.** An affidavit for appeal which, though awkwardly and inartistically drawn, substantially fills the requirements of the statute is sufficient. Perkins v. Mason, 315.

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1. **Reversal: Statute.** The statute enjoins on the appellate court not to reverse a judgment unless there has been error materially affecting the merits of the action. Burge v. Duden, 8.

2. **Motion for New Trial: Abstract: Record Proper.** When the appellant fails to make it appear in his abstract that the record proper shows that the motion for a new trial was filed and overruled, yet if the additional abstract of the respondent shows such fact, that is all that is necessary since a recitation of the fact and not a copy of the record is sufficient. Lapsley v. Merchants Bank, 98.

3. **Abstract: Affidavit: Order of Appeal.** An affidavit need not be set out in the abstract where the copy of the record entry recites that an affidavit for the appeal had been filed and an appeal had been allowed. Holland v. Railroad, 117.

4. **Full Transcript: Abstract.** Although the appeal be taken in the long form upon a full transcript, yet the appellant is still required to print an abstract under section 874, Revised Statutes 1899, and the appellate court will not go to the transcript to ascertain whether the errors spoken of exist. McQueen v. Groff, 165.

5. **Evidence: Finding.** Although there was ample evidence to have sustained the finding of the jury for the other party, the appellate court is not warranted in setting aside the verdict of the trial court. Veale v. Green, 182.

6. **Brief of Appellant.** Where the appellant's "statement, points and argument" contains no statement of the pleadings or facts shown by the record, no enumeration of the legal propositions relied upon, nor any assignment of errors alleged to have been committed by the trial court, the appellate court would be warranted in affirming the judgment. Kronck v. Reid, 430.

7. **Affirming for Failure.** Where an appeal has not been perfected in time for the term of the appellate court to which it is returnable, the cause will nevertheless not be affirmed for such failure, unless the respondent properly takes advantage of such failure by fulfilling on his part the conditions of section 812, Revised Statutes of 1899. Ib.

8. **Finding of Trial Court Conclusive.** The finding of a court, in a case tried without a jury, will not be reviewed by the appellate court when there is substantial evidence to support it. Fuhlhage v. Nagle, 471.

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9. **Verdict.** Where there was substantial evidence to support the verdict of a jury, it will not be disturbed on appeal. Manny v. Logeman, 552.

10. **Motion for New Trial: Instruction.** To secure a review of a trial court's action in giving an instruction, attention must be called thereto in the motion for a new trial. Jennings v. Kansas City, 677.

11. **Motion for New Trial: Record Proper: Bill of Exceptions.** The abstract of the record proper should show that the motion for a new trial was filed within the required time and likewise that the bill of exceptions was filed; otherwise there can be no review in the appellate court save of the record proper. Fast v. Gray, 694.

APPELLATE AND TRIAL PRACTICE.

**Weighing Evidence: Court's Discretion.** When there is substantial evidence to sustain a verdict the appellate court will not weigh it; that is the duty of the jury and the trial court. The trial court has a wide range of discretion, which will not be supervised except in cases of clear abuse. (Cases considered.) Hunt v. Ancient Order of Pyramids, 41.

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**Unliquidated Damages.** A half interest in an unliquidated claim for damages for personal injuries is not assignable, and, under section 540, Revised Statutes 1899, the assignment of a half interest in such a claim to her attorney would not prevent the client from suing in her own name as the real party in interest. McLeland v. St. Louis Transit Co., 473.

ASSUMPTION OF RISK. See **Master and Servant,** 5, 14.

**Instruction.** It is not the magnitude or the insignificance of a cause producing an injury which regulates the liability of the carrier, but it is his want of care; and an instruction that if the concussion of colliding cars was not greater than the usual concussion incident to the operation of mixed trains, then the plaintiff was held to assume the risk of such concussion is condemned. Holland v. Railroad, 117.

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BANKRUPTCY.

1. **Partnership; Jurisdiction.** In a proceeding to have a partnership adjudged bankrupt, a court of bankruptcy has jurisdiction in the district where one of the partners has resided or has been domiciled or has had his principal place of business for the greater portion of six months preceding the filing of the petition. Whitson v. Bank, 605.

2. **Same: Evidence.** Copies of the adjudication and the order of the referee approving the bond of the trustee, duly authenticated under section 3135, Revised Statutes 1899, were properly admitted in evidence, without affirmative proof that process had been served on either of the partners, though there was evidence to show that one of them had continuously resided in another State for a period antedating the inception of the bankruptcy proceeding and was therefore beyond the reach of process. Ib.

3. **Intention of Bankrupt: Knowledge of Creditor.** In an action by the trustee in bankruptcy to avoid a preference, under section 60, paragraph b of the bankruptcy act of 1898, in order to recover, it is necessary to show that the bankrupt intended to give a preference to the defendant and that the defendant had reasonable cause to believe that he so intended. Ib.

4. **Notice: Agent.** Notice on the part of an agent that will bind his principal is ordinarily such as is acquired during the agency and where the preference was a chattel mortgage taken by the preferred creditor, a bank, and the business was transacted by the bank's cashier and president, the knowledge of the intended preference by one put in charge of the mortgaged property for the bank, obtained before he was employed by the bank and while acting as clerk for the bankrupt, is not imputable to the bank. Ib.

5. **Preference: Extent of Liability.** Where a bankrupt had executed two mortgages on a stock of goods and the first mortgagee took possession and, after selling a sufficient amount of the goods to satisfy his mortgage, turned the remainder over to the second mortgagee, in a successful action by the trustee to avoid the first mortgage as a preference the defendant was liable for the value of the entire stock of goods. Ib.

BANKS AND BANKING.

1. **Statutory Construction: Dividends: Surplus.** The provision of section 1293, Revised Statutes 1899, requires that 10 per cent of the net profits shall be set aside as surplus before dividends can be declared on the stock; this provision is mandatory since any other construction would defeat the whole aim and object of the statute. Adhered to on motion for rehearing. Lapsley v. Merchants Bank, 98.

2. **Dividends: Surplus: Pleading: Issues.** In a stockholder's suit for dividends on his stock the petition averred that the directors declared the dividend and that they had competent authority to do so. The answer in addition to a general denial alleged the dividend was illegal and payment unlawful and denied that such dividend was in law or fact ever declared. No objection was made to the indefiniteness of the answer. *Held*, the question can be raised on the pleadings as to whether 10 per cent

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had been carried to the surplus before declaring the dividend. Ib.

3. **Officer's Salary: Instruction: Contract.** If the president of a bank fails to comply with the contract of his employment, he ought not to recover on it, and instructions to that effect should be given. Adhered to on motion for rehearing. Ib.

4. **Pleading: Evidence: Objection.** While the pleading in this case was broad enough to admit the evidence of failure to carry a part of the earnings to the surplus fund, yet if it be not so, the fact that the evidence was admitted without objection precludes the plaintiff from raising the point. Ib.

5. **Principal and Agent: Authority to Collect: Borrowing.** An agent to sell and collect has no authority to borrow money for or in the name of his principal, even though it be for use in his principal's business, and the principal can not be held unless he ratifies. Case v. Hammond Packing Co., 168.

6. **Same: Notice: Check.** The agent's individual check on the bank remitted to the principal gives the latter no notice that principal has an account with with the drawee bank, but on the contrary that the agent has. Ib.

7. **Same: Ratification: Evidence.** A principal may accept money from his agent in the course of business without inquiry into the source from which it came, and can not be compelled to restore the same to the true owner. Ib.

8. **Same.** If money due a principal from his agent is obtained by the unauthorized use of the principal's name and paid over to him, and he receives it in good faith without notice, he is not liable to the party from whom the agent got the money, nor does his retaining it after being informed amount to ratification. Ib.

9. **Misappropriation by Cashier: Notice.** The cashier of a bank drew, over his official signature, drafts upon the bank's correspondents in distant cities, and transmitted them to the defendant, a commission company, which collected them and used the proceeds, under the instructions of the cashier, on his individual account, in grain speculations, whereby the money was lost and the receivers of the bank, after its failure, sued the defendant for the proceeds of drafts. *Held*, the manner in which the money was transmitted was notice to the defendant that the cashier was using the funds of the bank on his individual account. *Held*, further, though the directors of the bank were guilty of gross neglect in their careless supervision of the business, and permitted the cashier to have exclusive management of its affairs, this constituted no defense. *Held*, further, that the defendant, commission company, having notice of the misappropriation of the funds by the cashier, was liable for the amount thus misappropriated. Kitchens v. Teasdale Com. Co., 463.

10. **Same: Evidence: General Denial.** The answer of the defendant being a general denial, with no offer to amend, evidence of a secured note given by the cashier and accepted by the directors of the bank in settlement of the claim, was properly excluded. Ib.

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11. **Same.** Expert testimony to the effect that it was a general custom for cashiers of banks to draw drafts upon their own banks in payment of their own indebtedness, was not admissible. Ib.

12. **Letter of Credit: Exhaustion of.** Whether a person who advances money on a letter of credit the limit of which has already been exhausted without his knowledge, can recover of the writer, *quaere*. Bank v. Bank, 722.

13. **Same: Claims Upon: Scienter.** A party seeking reimbursement against the writer of a letter of credit must show that he acted on the faith of the letter; and where he had no knowledge of the letter his claim must fail. Ib.

14. **Same.** Defendant bank issued its letter of credit for $1,000. Plaintiff bank on the faith of the letter paid the holder's checks to the amount of $500 at one time. Thereafter a third bank paid checks of the holder without any knowledge of the letter and the defendant bank took them up and charged them against the letter. Thereafter plaintiff bank paid other checks of the holders for $500 which defendant bank refused to take up since the letter had been exhausted by the checks of the third bank. *Held*, it was liable to plaintiff for the latter checks. Ib.

BILL OF EXCEPTIONS. See **Appellate Practice**, 11; **Costs**, 1, 2, 3.

BILLS AND NOTES.

1. **Evidence: Indorsements.** In an action on a promissory note it is generally necessary that plaintiff prove the indorsements by evidence *aliunde*. Dunlap v. Kelly, 1.

2. **Same.** However, where a plaintiff who is payee indorses and again comes in possession of the note he is not required to prove the indorsements. Ib.

3. **Same: Pleading.** But should such payee plead the indorsement from himself to his indorsee and the indorsee's transfer back to the payee he will be required to prove such indorsements. since he makes them a part of his title and should prove them as alleged. Ib.

4. **Same.** Though such pleading of the indorsements be unnecessary, they become material when alleged and are not mere surplusage. (Cases considered.) Ib.

5. **Principal and Surety: Pleading: Judgment.** That defendant was a surety known to the payee in a promissory note that for years the principal was solvent and defendant's residence was well known to the payee, that defendant did not know the date of the note nor the postoffice address of the payee, that the principal had informed him the note was paid, that he did not learn the contrary until the principal was insolvent, and that if defendant had learned of the non-payment when it become due he could have protected himself, do not constitute a defense or estoppel and judgment may be rendered for the plaintiff on such answer. Burge v. Duden, 8.

6. **Same: Notice to Sue.** A surety may give notice to the payee in a note to sue thereon and will be exonerated from liability if suit is not brought; but the passivity of payee without such notice will not release the surety. Ib.

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7. **Same: Name of Payee.** A surety is presumed to have read a note before he signs it, and can not be heard to claim ignorance of the name of the payee therein. Ib.

8. **Check: Principal and Surety: Presentation.** Delay in the presentation of a check does not release the drawer since he is not a surety but the principal debtor. A check is an absolute appropriation of the money in the bank and it ought to remain there until called for. Nelson v. Kastle, 187.

9. **Same: Delay in Presentation: Burden of Proof.** But the holder has the burden of proof to show that the drawer has not suffered loss by the failure to present. Ib.

10. **Protest: Evidence: Statute.** The certificate of protest is not evidence of any collateral fact therein stated and, under the statute only proves two facts: demand and refusal to pay. Recital of why the drawee refuses to pay is not admissible. Ib.

BOOKS OF ACCOUNT. See **Insurance**, 15.

BOOKS AND SAFE. See **Insurance**, 11, 12.

BORROWING. See **Banks and Banking**, 5.

BRIEF. See **Appellate Practice**, 6.

BURDEN OF PROOF. See **Bills and Notes**, 9; **Equity**, 2; **Practice**, 3.

CAPITAL STOCK. See **Corporations**, 3.

CARRIERS OF PASSENGERS. See **Practice**, 3.

1. **Contributory Negligence.** In an action by a passenger against a street railway company, for injuries caused while standing on the front platform of defendant's car, by the negligence of the motorman in letting the brake handle fly and strike plaintiff's arm, it was not error to refuse an instruction which authorized a recovery in spite of the fact that plaintiff may have been negligent in placing his arm within the radius of brake lever. Brewer v. St. Louis Transit Co., 503.

2. **Same: Harmless Error.** Where the evidence tended to show the platform was crowded, it was error to give an instruction which ignored the motorman's duty of anticipating some one being within the radius of the brake, and breaking the force of the revolutions, but the error was harmless, where the plaintiff's evidence showed that he had ample room to keep out of the way of the brake, where he knew the signal to start had been given and that the brake handle would immediately begin to revolve. Ib.

3. **Duty to Passengers Boarding Car.** A street railway company, in receiving passengers into its cars, is bound to give them reasonable time to reach places of safety therein. Stoddard v. Railroad, 512.

4. **Same: Time to Board Car in Safety.** And, in an action for injuries received while boarding defendant's motor car, where the evidence showed that plaintiff, after getting on the rear platform, was thrown and hurt by the sudden lurching of the

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car in starting before she could get farther, she made out a prima facie case of negligence on the part of defendant, which proximately caused her injuries. Ib.

5. **Same: Signal to Stop.** After the defendant's car stopped to receive passengers, it was its duty to allow plaintiff to get safely aboard, notwithstanding plaintiff did not signal the car to stop, in the absence of evidence of contributory negligence on the part of plaintiff. Ib.

6. **Passenger.** One may become a passenger on a street car in attempting to get on a car at a place where people are expected to take passage, though his attempt fails; but a man does not become a passenger by making such an attempt where he is not expected, when the motorman is ignorant of his presence. McCarty v. Railroad, 596.

7. **Same: Negligence of Carrier.** Where one attempted to board a car when it was stopped, but not for the purpose of receiving passengers, nor at a place where passengers are usually received, the carmen in charge of the car were not guilty of negligence in suddenly starting the car so as to throw him off, unless they knew he was attempting to get aboard; they were not bound to watch for passengers at that place. Ib.

8. **Negligence of Carrier: Hand Rail.** Where plaintiff, in an action against a street railway company for damages received while attempting to board one of its cars, proved that the handrail, which he clutched to aid him in getting safely on, gave way and he was thrown off and injured, he made out a prima facie case of negligence on the part of the defendant which proximately caused his injury. Ib.

9. **Same: Usual Place.** And this is true though the plaintiff was attempting to board the car at a place where passengers are not usually received. Ib.

CAUSE OF ACTION. See **Amendments**, 1; **Pleading**, 1; **Trial Practice**, 5.

CHECK. See **Banks and Banking**, 6; **Bills and Notes**, 8, 9.

CIRCUMSTANTIAL EVIDENCE. See **Principal and Agent**, 7.

CLAIM. See **Banks and Banking**, 13, 14; **Insurance**, 3.

COLLATERAL ATTACK. See **Municipal Corporations**, 20.

COMMISSIONS. See **Real Estate Broker**, 1.

COMMON CARRIERS.

1. **Connecting Lines.** Under the statute (section 944, Revised Statutes 1889), a common carrier which contracts to carry goods to their destination over connecting lines, is liable for damages occurring to such goods by the negligence of connecting lines, and it can not, in making such contract of carriage, stipulate to exempt itself from such liability. Nenno v. Railroad, 540.

2. **Same: Conflict of Laws.** But where a contract was made in Illinois for the shipment of goods from a point in that State to a point in Missouri, over connecting lines, the statute of

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Missouri does not apply, and the carrier making the contract could limit its liability to damages which might occur on its own line. Ib.

3. **Same: Connecting Station.** And the omission from the bill of lading of the name of the station where the goods were transferred to the connecting line did not affect the validity of the exemption. Ib.

4. **Same: Conflict of Laws.** The presumption is that the common law prevailed in Illinois, and a statute of that State, similar to our own in relation to liability on connecting lines, could not be considered, unless introduced in evidence. Ib.

5. **Prima Facie Case: Animals.** In an action against a common carrier for damages to horses shipped, the evidence showed the horses were received by the defendant in good condition, that in the course of transportation the car containing them was overturned, that when rescued from the car they bore marks of accident and subsequently they were shown to be unserviceable and one of them died within a month, a prima facie case was made out for the jury. Livery Co. v. Railroad, 556.

6. **Affreightment: Evidence.** A contract of affreightment signed by the consignor in duplicate, one copy of which is retained by the carrier is admissible in evidence between the consignee and the carrier since it is equally binding on both. Burriss & Haynie v. Railroad, 659.

7. **Same: Parties: Action.** A contract of affreightment with a common carrier may be enforced by either the consignee or the consignor. Ib.

COMPLAINT. See **Forcible Entry and Detainer.**

COMPROMISE. See **Insurance,** 4.

CONCURRING NEGLIGENCE. See **Street Railways,** 2.

CONFLICT OF LAWS. See **Common Carriers,** 2, 4.

CONNECTING LINES. See **Common Carriers,** 1, 2, 3, 4.

CONNECTING STATION. See **Common Carriers,** 3.

CONSIDERATION. See **Deeds,** 1, 2.

CONSTRUCTION. See **Contract,** 1; **Dramshops,** 1; **Jurisdiction.**

CONTINUANCE. See **Trial Practice,** 7, 8.

CONTRACT. See **Banks and Banking,** 3; **Corporations,** 1; **Equity,** 2, 3; **Evidence,** 2; **Pleading,** 8; **Taxbill,** 2, 5.

1. **Construction of.** The contract, for breach of which suit was brought, provided that the defendant was to furnish logs at the plaintiff's saw mill in numbers "limited by the reasonable convenience" of the defendant, to endeavor to supply logs sufficient to enable the plaintiff to run his saw mill all the time and cut such lumber as the defendant could sell each month, and



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"to log said mill to its capacity to cut, limited only by the amount of lumber the said party of the first part (defendant) should be able to sell at satisfactory prices." *Held*, the contract did not constitute the defendant judge as to the quality of the timber to be supplied to plaintiff, but that the purpose of the parties was to manufacture and sell marketable lumber. *Held* further, the phrase, "satisfactory price," in the contract should be a price which would yield the defendant a reasonable profit. *Held* further, the contract required the defendant to furnish timber from which could be manufactured salable lumber and to make reasonable efforts to put sound and salable lumber on the markets, and if, by such efforts, sales at reasonable profits could be made, defendant was bound to furnish sufficient logs to keep the plaintiff's mill continuously running. *Held* further, that the plaintiff was obliged, when furnished with such sound lumber, to saw it in a workmanlike manner and of such dimensions as required by defendant. Rhodes v. Land & Lumber Co., 279.

2. **Damages for Breach of.** The measure of damages in actions for breach of contract is a matter of law for the court to declare in its instructions, and not a matter for the jury to speculate upon. Ib.

3. **Same.** In an action for failure to keep plaintiff's saw mill supplied with logs, according to contract, the measure of damages is the loss of the net profits which plaintiff would have realized from the operation of his mill if he had been supplied with logs according to the terms of the contract. Ib.

4. **Validity: Administration.** Where the evidence showed that a decedent had intended to bequeath a certain sum to plaintiff, but did not do so, and had promised that plaintiff should be paid that sum after decedent's death if the bequest was not made, for extra services performed by the plaintiff, plaintiff's claim for the amount was properly allowed against decedent's estate. Graham v. Rapp, 590.

5. Where a servant employed at stipulated wages, performed extra work with the expectation of receiving extra compensation, which the employer had promised in a definite sum, she was entitled to recover such sum, although she testified that she would have performed the services without any promise of compensation. Ib.

6. **Rescission: Dual Agency: Evidence.** On the pleading and evidence an instruction submitting to the jury the issue of rescission of contract effected by dual agency was justified. Harper v. Fidler, 680.

CONTRACTORS. See **Taxbills**, 4.

CONTRACTOR'S BOND.

1. **Subcontractors May Sue On It.** Where public officials contract for a public improvement and exact from the contractor a bond, binding him to pay parties for labor and material furnished, such parties may sue on the bond as a contract made for their benefit. (Distinguishing State ex rel. v. Loomis, 88 Mo. App. 500.) Buffalo Forge Co. v. Cullen & Stock Mfg. Co., 484.

2. **Same: Assignment Clause.** Where such a bond, given by a contractor, contains a clause providing that it might be assigned

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by the obligee to subcontractors, materialmen and laborers, and stipulating that, in case of such assignment, it should inure to the benefit of all such parties alike, in proportion to their respective demands, but no assignment is made by the obligee, the subcontractor and materialmen may nevertheless sue on it as a contract made for their benefit. Ib.

CONTRIBUTORY NEGLIGENCE. See **Carriers of Passengers,** 1, 2; **Master and Servant,** 16; **Municipal Corporations,** 26; **Railroads,** 6; **Street Railways,** 1.

CONVERSION. See **Money Had and Received,** 2.

CORPORATIONS. See **Insurance,** 2, 3, 5, 6, 7.

1. **Ultra Vires: Executed Contract.** Where a contract with a corporation is executed by the other party the corporation will not be permitted to plead *ultra vires,* unless its charter makes such excess void or the agreement was against public policy and good morals. York v. Farmers Bank, 127.

2. **Partnership: Liability of Directors.** Individuals comprising a corporation may render themselves personally liable to creditors by their actions, defaults and representations; and where such action operates as a fraud on third parties the relation of partnership may be said to exist between incorporators with respect to such parties. Hyatt v. Van Riper, 664.

3. **Same: Capital Stock: Dissolution.** The liability of the directors attaches though the corporation has not been formally dissolved where the capital stock has never been paid and the corporation was insolvent from its inception; and also where the business is not conducted as a corporation but all payments are made by one of the incorporators without any money passing through the treasurer of the corporation and without any corporate action. Ib.

4. **Same: Pleading: Judgment.** A petition against incorporators alleged that plaintiff contracted upon the faith of the company being what its articles of association warranted, to-wit, solvent. *Held,* it stated a cause of action which supports a judgment on the ground of partnership. Ib.

COSTS.

1. **Bill of Exceptions: Stenographer's Notes: Statute.** Section 10115, Revised Statutes 1899, does not authorize a fee to a stenographer for preparing a bill of exceptions which fee can be taxed as costs. It only provides a fee for the copy of the settled bill of exceptions, and that only when it becomes necessary to present a copy thereof to the appellate court. Drumm-Flato Com. Co. v. Bank, 197.

2. **Same: Appellate Practice.** There is no law authorizing a stenographer to make a bill of exceptions at the request of either party, nor can a recovering appellant recover the expense of making his bill of exceptions. Ib.

3. **Same: Appellate Practice.** The costs incurred in making a copy of the bill of exceptions can not be taxed against the respondent where the appeal is taken in the short form. Ib.

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COUNTERCLAIM. See **Verdict**, 2.

COURT. See **Appellate and Trial Practice; Municipal Corporations**, 3; **Trial Practice**, 7, 8.

CREDITORS. See **Fraudulent Conveyance**, 1.

CUSTOM. See **Evidence**, 1.

DAMAGES. See **Contracts**, 2, 3; **Partnership**, 2; **Sales**, 4.

1. **Measure of.** In an action for damages, under sections 2865 and 2866, by parents for the death of their son, caused by the defendant's negligence, it was error to instruct the jury that they could assess such damages as, in their judgment, would compensate the plaintiffs for the loss of their son, without giving more definite instructions as to the measure of such damages. Coleman v. Land & Lumber Co., 254.

2. **Future Pain: Reasonable Certainty.** Future pain and anguish recoverable in an action for personal injuries must be limited to such as will be reasonably certain to occur, and an instruction to the jury which allows damages for such pain and anguish as plaintiff "may suffer in the future," is error, because ignoring the bounds of reasonable certainty. Schwend v. St. Louis Transit Co., 534.

3. **Instruction: Defendant's Duty.** An instruction in general terms that the damages should fairly compensate for injuries received is held sufficient since it was correct as far as it went and it was with defendant to make it more specific if desired. Parman v. Kansas City, 691.

DANGEROUS EMPLOYMENT. See **Master and Servant**, 9.

DATE. See **Druggist**, 1.

DEATH OF PRINCIPAL. See **Real Estate Broker**, 5.

DECLARATIONS. See **Advancement**, 1, 2; **Principal and Agent**, 10.

DEEDS.

1. **Consideration: Parol Evidence: Estoppel: Statute.** Where a deed recites a consideration a party is estopped from defeating its operative effect as a conveyance; and section 645, Revised Statutes 1899, does not affect the law of estoppel and a grantor can not defeat the conveying effect of such deed by showing it was voluntary. Wishart v. Gerhart, 112.

2. **Same.** Wherever a deed is valid or creates or extinguishes a right by contract or otherwise, parol evidence is inadmissible to alter or contradict the legal construction of the instrument and the grantor can not gainsay it. Ib.

DEFECTIVE ALLEGATION. See **Pleading**, 13.

DEFECTIVE PETITION. See **Pleading**, 12.

DEFECTIVE SIDEWALK. See **Municipal Corporations**, 13, 14, 15, 16, 17, 18, 19, 26.

DEFINITION. See **Principal and Agent**, 18.

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DEGREE OF CARE. See **Minors.**

DELIVERY. See **Sales,** 2, 3.

DEMURRER. See **Passenger Carriers,** 1; **Pleading,** 10; **Trial Practice,** 11.

DEPARTURE. See **Municipal Corporations,** 18; **Pleading,** 5, 6, 7; **Street Railways,** 3.

DEPOSIT. See **Insurance,** 6.

DESCRIPTION. See **Forcible Entry and Detainer; Municipal Corporations,** 21.

DILIGENCE. See **Trial Practice,** 8.

DISCHARGE. See **Administration,** 1.

DISSOLUTION. See **Corporations,** 3.

DIVIDENDS. See **Banks and Banking,** 1, 2.

DRAMSHOPS.

1. **Qualified Petitioners: Merchants: Taxpayers: Construction.** A licensed merchant doing business in a block is an assessed taxpaying citizen within the meaning of section 2993, Revised Statutes 1899, and is a qualified petitioner for the granting of dramshop license, and should be counted as against it if his name does not appear on such petition. State ex rel. v. Kingsbury, 22.

2. **Instructions to Bartenders.** Where, on the trial of defendant, a licensed dramshop keeper, on the charge of selling liquor on Sunday, the testimony of the defendant himself, and other witnesses for him, was to the effect that he had given his barkeepers rigid instructions not to sell on Sunday, and the evidence for the State, elicited from reluctant and hostile witnesses, showed the commission of the acts complained of by defendant's barkeepers, and the jury were instructed to consider whether defendant's instructions to his barkeepers, not to sell on Sunday, were made in good faith, a verdict of guilty will not be disturbed. State v. Terry, 428.

DRUGGIST.

1. **Selling Liquor Without Prescription: Date.** In an indictment against the proprietor of a drugstore and a pharmacist for selling intoxicating liquor in less quantities than four gallons without a prescription from a physician, it is not necessary to state the date of such sale when the name of the purchaser is given. State v. McAnally, 333.

2. **Suffering Liquor to be Drunk on Premises: Name.** In an indictment against a druggist for suffering liquor to be drunk on his premises, under section 3051, Revised Statutes of 1899, it is not necessary to name the person who was permitted to drink the liquor. Ib.

3. **Same.** On the trial of a druggist for suffering liquor to be drunk on his premises, an instruction which required the jury to

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find the defendant "did unlawfully suffer and knowingly permitted Andrew Stickler to drink, etc.," is fully sufficient to meet the requirement of the statute, section 3051, Revised Statutes of 1899, under which the indictment is framed. Ib.

DUAL AGENCY. See **Contract**, 6; **Principal and Agent**, 17.

DUTY. See **Carriers of Passengers**, 3, 4, 5; **Damages**, 3; **Master and Servant**, 1, 3; **Railroad Crossing**, 2, 3; **Telegraph Companies**, 2, 3; **Trial Practice**, 3.

EJECTMENT.

**Mortgages: Redemption: Rents and Profits.** The purchaser under a mortgage foreclosure sale sued in ejectment for possession and the answer prayed that the mortgagor might redeem from the mortgage on account of irregularities in the sale. The judgment was for plaintiff for possession, but provided that the mortgagor might redeem, by a given date, by payment of the debt secured by the mortgage, and that, in case she failed to do so, execution would then issue for possession. *Held*, in a suit by the mortgagor for the rents, she was entitled to the rents and profits up to the expiration of the time fixed for redemption, although she did not redeem. *Held*, further, under a stipulation entered into between the parties, pending the ejectment suit, whereby they agreed that the rents should be paid to the successful party, the mortgagor was entitled to the rents for that period as the successful party. Dix v. Lohman, 619.

EMANCIPATION. See **Master and Servant**, 10.

ENGINEER'S DUTY. See **Negligence**, 2, 3; **Railroads**, 5.

EQUITY.

1. **Adequate Remedy: Action.** When there is no adequate remedy at law in the very nature of things equity affords a remedy. Byers v. Weeks, 72.

2. **Reforming Contract: Burden of Proof: Evidence.** One who seeks in equity to reform a written contract on the ground of mistake, has the burden of overthrowing by evidence which is clear and convincing, the prima facie presumption that the contract expresses the agreement of the parties. Meredith v. Holmes, 343.

3. **Same: Sufficiency of Evidence.** In an action to reform a written instrument on the ground of mutual mistake, and incorporate an additional stipulation by parol, the evidence is examined and held adequate to support a judgment for defendant. Ib.

ESTOPPEL. See **Deeds**, 1; **Principal and Agent**, 6, 9, 12, 13, 14.

EVIDENCE. See **Animals**; **Appellate Practice**, 5, 10; **Bankruptcy**, 2; **Banks and Banking**, 4, 7, 8, 10, 11; **Bills and Notes**, 1, 2, 3, 4, 10; **Contract**, 6; **Common Carriers**, 6; **Equity**, 2, 3; **Interplea**, 2; **Judgment**, 1, 2; **Master and Servant**, 2, 3, 4, 15, 16; **Municipal Corporations**, 5, 6, 7, 8, 9, 12, 17; **Money Had and Received**, 5; **Passenger Carriers**, 4, 5; **Pleading**, 2, 10; **Principal and Agent**, 11; **Real Estate Broker**, 2 3, 4, 7; **Trial Practice**, 4; **Witnesses**, 1.

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1. **Value of Services: Custom.** Though a custom may not be proven to alter a general principle of law, yet such evidence is admissible as to the value of services. Hurt v. Jones, 106.

2. **Contract Collateral to the Main Issue.** In an action for the value of some timber, sold and delivered by plaintiff to defendant, where, under the defense urged, the main issue was whether or not the timber was cut from the land of a stranger who had seized it, a written contract between plaintiff and another stranger giving plaintiff a license to cut timber on the latter's land, was collateral to the main issue and its production in evidence was not necessary. Morgan v. Lumber Co., 239.

EXCHANGE. See **Homestead,** 2.

EXECUTION. See **Homestead,** 1.

EXECUTION SALES.

**Purchaser With Notice.** One who purchased, at an execution sale, chattels which were in the possession of the execution defendant at the time of the seizure, under a lease from the owner with an option to buy, was not an innocent purchaser where he had notice before he bought, who the real owner was. Sperling v. Stubblefield, 489.

EXHAUSTION. See **Banks and Banking,** 12.

EXHIBITING QUOTATIONS. See **Information,** 4, 5.

EXPERT TESTIMONY. See **Rate of Speed.**

1. **Inferences From the Evidence.** It is improper to ask an expert witness to give his opinion basing it upon evidence he has heard introduced. Livery Co. v. Railroad, 556.

2. **Same: Jury Must Weigh Oral Testimony.** Nor is such expert evidence harmless error on the ground that the testimony on which it is based is undisputed, where such evidence is oral; under the practice now prevailing all testimony, not documentary, upon issues joined, must be submitted to the jury. Ib.

FAILURE TO TRANSMIT. See **Telegraph Companies,** 1.

FILING ANSWER. See **Trial Practice,** 2.

FINDING. See **Appellate Practice,** 5, 8; **Municipal Corporations,** 2.

FORCIBLE ENTRY AND DETAINER.

**Complaint: Description: Remedy.** A complaint in unlawful detainer is held sufficient although it fails to state that the property is in the city ward of the justice before whom it is filed; and a grantee who purchases at foreclosure sale may maintain unlawful detainer against the grantor. Wishart v. Gernart, 112.

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FORECLOSURE. See **Mortgages and Deeds of Trust**, 1, 2, 3.

FRAUD. See **Principal and Agent**, 1, 2.

FRAUDULENT CONVEYANCES.

1. **Unconditional Conveyance: Contingent Liability: Creditors.** In the absence of fraud a mortgage on its face purporting to secure an unconditional debt is not void as to creditors though in fact given to secure a contingent liability. Gee v. Van Natta-Lynds Drug Co., 27.

2. **Mortgagor in Possession: Stock of Goods: Usual Business.** When a mortgagor remains in possession disposing of the mortgaged goods in the usual course of business without accounting in any manner to the mortgagee, the mortgage is void as to creditors. Cases considered and distinguished and the point is affirmed on motion for rehearing. Ib.

3. **Change of Possession: Bailment: Notice.** When property is not in the possession of the vendor, but is actually in the possession of a third party as bailee, an order for the property on its sale and notice to the bailee is all that is necessary to transfer the possession as against the creditors of the vendor. Porter v. Shotwell, 177.

4. **Same: Notice to Vendee.** Certain instructions relating to the access of the vendor to the transferred property are held properly refused since they fail to submit the question of the vendee's notice and assent of the conduct of the vendor. Ib.

5. One who has received payment of an indebtedness due him, from the purchase money paid his debtor as a consideration for the sale of the latter's goods, with a knowledge of the source from which the money came, can not afterwards attack such sale is in fraud of creditors. Torreyson v. Turnbaugh, 439.

FULL TRANSCRIPT. See **Appellate Practice**, 4.

FUTURE PAIN. See **Damages**, 2.

GAMBLING.

1. **Option Dealing.** Losing money in option deals, where money is deposited or paid for margins, is not losing money at a game or gambling device, so as to authorize a recovery of the amount lost, under section 3424, Revised Statutes of 1899; the statutes (sections 2221 to 2225 and 2337 to 2342), which declare such dealing to be gambling, affix a different punishment. See v. Runzi, 435.

2. **Stakes Lost.** The loser of a bet, in the absence of statutory enactment authorizing it, can not recover a stake which he has voluntarily paid the winner. Ib.

GAMING. See **Sales**, 1.

GENERAL DENIAL. See **Banks**, 10.

GRADING. See **Taxbills**, 1, 3.

GROUNDS STATED IN ORDER. See **New Trial**, 1.

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GUARDIAN AND WARD.

**Misconduct of Guardian.** Where the guardian of a minor, in managing the trust estate, performs his services with a view to his own interest rather than the interest of his ward, after being reimbursed for expenses incurred, is not entitled to any compensation for his services, although his acts have resulted in benefit to the estate. Robords v. Bryan, 249.

GUARDING DEFECT. See **Municipal Corporations**, 17, 18, 19.

HAND RAIL. See **Carriers of Passengers**, 8.

HARMLESS ERROR. See **Carriers of Passengers**, 2; **Insurance**, 17.

HEADLIGHT. See **Negligence**, 3.

HEIR. See **Administration**, 3; **Real Estate Broker**, 7, 8.

HOMESTEAD.

1. **Execution: Residence.** Visible occupancy of premises as the head of a family at the time of the levy of a writ fixes the homestead rights of the defendant; and if he lives away from the premises an *animus revertendi* is not sufficient to preserve the homestead right. And the facts in this case are insufficient to show a homestead right. Zollinger v. Dunnaway, 36.

2. **Exchange: Sale: Reasonable Time.** One may exchange his homestead for another and a reasonable time is allowed for removing from the one to the other; or he may sell with the intent to reinvest in another homestead and a reasonable time will be allowed for such purpose, but occupancy can never be disassociated from the homestead. (Cases considered and distinguished.) Ib.

IMPEACHMENT. See **Witnesses.**

IMPLIED POWERS. See **Principal and Agent**, 8.

INCIDENTAL POWERS. See **Principal and Agent**, 4.

INCONSISTENT DEFENSES. See **Trial Practice**, 9.

INCREASE OF RISK. See **Insurance**, 14.

INDICTMENT.

1. **Receiving Stolen Goods: Name of Owner.** An indictment against one for receiving stolen goods, which omits to name the owner of the goods stolen, is fatally defective; giving the name "Butler Brothers" is not sufficient because it is neither the name of an individual nor a corporation, nor a partnership composed of individuals whose names are given. State v. Pollock, 273.

2. **Verdict.** If the jury undertakes to set out in a verdict the elements of the crime of which they find the defendant guilty and make no reference to the indictment, every material element of the offense charged must be set forth in the verdict, otherwise it will not support a judgment. Ib.

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3. **Same.** A verdict which found, without referring to the indictment, a defendant guilty of receiving stolen property, and failed to find that he knew the property was stolen, was not responsive to the indictment and a judgment rendered thereon should have been arrested. Ib.

4. Where, on the trial under an indictment in three counts, the defendant was found guilty on two of the counts, the failure to make any finding on the remaining count, there being no evidence to sustain it, was equivalent to an acquittal on such remaining count. State v. McAnally, 333.

INDIVIDUAL DEBT. See **Partnership**, 1, 2.

INDORSEMENTS. See **Bills and Notes**, 1. 2, 3, 4.

INFERENCES. See **Expert Testimony**, 1, 2.

INFORMAL PETITION. See **Pleading**, 10, 11.

INFORMATION. See **Option Dealing**, 1.

1. **Verification: Motion to Quash.** An information not supported by affidavit, as required by section 2477, Revised Statutes of 1899, will be held bad on a motion to quash. State v. Runzi, 319.

2. **Same: Objection Can Not Be Made on Appeal.** But such an affidavit forms no part of the information itself, and the omission of it, if objection is not taken by timely and specific motion, will be considered waived; the objection can not be made for the first time, after judgment, by motion in arrest, or on appeal in the court of appeals. (Overruling State v. Connor, 58 Mo. App. 457 and State v. Sayman, 61 Mo. App. 244.) Ib.

3. **Language of Statute.** An information in the language of the statute creating the offense, sought to be charged, is sufficient where the statute so far individuates the offense that the defendant has proper notice, by its terms, of the offense for which he is to be tried. Ib.

4. **Same: Option Dealing: Exhibiting Quotations.** An information under section 2338, Revised Statutes of 1899, charging, in the language of that statute, that defendants permitted the exhibition and display upon a blackboard the quotations of the price of stocks, etc., and locating the offense in the proper county, is sufficient, and need not more particularly describe the place nor allege who saw the exhibition. Ib.

5. **Same: Each Day's Exhibit a Separate Offense.** Where the offense is charged in several counts, as committed on successive days, it will not be treated as one count charging continuing offense, but each day's exhibition of quotations was a separate offense. Ib.

INJUNCTIONS. See **Damages**, 3; **Trial Practice**, 1, 2; **Waste**.

INSTRUCTIONS. See **Appellate Practice**, 10; **Assumption of Risk; Banks and Banking**, 3; **Dramshops**, 2; **Insurance**, 12; **Master and Servant**, 3, 16, 17; **Money Had and Received**, 2, 4; **Municipal Corporations**, 3, 6, 7, 8, 9, 10, 11, 12, 14, 16; **Passenger Carriers**, 2, 3; **Practice**, 7; **Principal and Agent**, 11, 18; **Railroads**,

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4; **Railroad Crossing**, 2; **Real Estate Broker**, 2; **Street Railways**, 3; **Trial Practice**, 6, 9.

INSURANCE.

1. **Representations: Warranties: Agents Filling Out Application.** Where the agent secures the insured to sign a blank application and he fills out the blanks therein, and though the insured afterwards signed the same without knowing what they were, such statements become those of the insurer and he is estopped to claim them as warranties. Ormsby v. Insurance Co., 143.

2. **Principal and Agent: Corporations.** *Held*, on the facts in this case that the agent of an insurance company and the president of a milling corporation in issuing and taking out a policy on the mill bound their principals; that the policy was delivered and accepted and valid though the premium was not wholly paid; and the policy continued in force to the date of the loss notwithstanding an attempted cancellation by the insurance company without notice to the milling corporation. Milling Co. v. Insurance Co., 146.

3. **Same: Loss: Claim.** *Held*, after the loss no option the milling corporation could exercise could affect the validity or invalidity of its claim. Ib.

4. **Same: Return of Premium Paid: Compromise.** After the loss the return of the part of the premium paid and its retention by the president of the milling corporation for a time did not operate as a compromise since such an agreement must be understandingly made. Ib.

5. **Same: Corporation: Loss: Power of President.** After the loss the president of the milling corporation, through its general agent, had no power to give away the damages that accrued to the corporation. Ib.

6. **Same: Tender: Deposit.** The tender of a certificate of deposit if not objected to may be a valid tender, but the tender must be made to the party and a mere deposit in the bank in the name of the party is not a tender. Ib.

7. **Same: Power of President: Return of Premium: Tender Back.** After the loss on the policy the president of the milling corporation had no authority to receive back the premium paid for the insurance; and consequently there was no necessity for his tendering the return of same to the insurance company. Ib.

8. **Value of Goods: Must Be Proven.** In an action on an insurance policy covering a stock of goods, it is necessary for plaintiff to prove the value of the goods at the time of the loss. Howerton v. Insurance Co., 575.

9. **Valued Policy.** Section 7979, Revised Statutes 1899, having been enacted subsequent to sections 7969 and 7970, the term "property" used therein, relating to valued policies of insurance, embraces both personal and real property, as defined by section 4160 and is not limited to real estate under the provisions of sections 7969 and 7970. Ib.

10. **Inventory: Waiver.** Where a policy of insurance on a stock of goods provides that an inventory should be taken within sixty

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days, but a rider was attached providing that an inventory should be taken at least once a year during the life of the policy, in an action on the policy, for the destruction of the property, brought within a year, the failure to take an inventory was not a defense. Ib.

11. **Books and Safe.** And where the compliance of plaintiff with another provision of the policy, requiring him to keep books, preserve them in a place of safety and produce them on demand, was put in issue by the pleading, and the evidence was inconclusive upon that point, the issue should have been submitted to the jury upon proper instructions. Ib.

12. **Same: Instructions.** But instructions concerning that point were properly refused, where they included the question of compliance with the clause requiring an inventory, the time limit for taking which had not expired. Ib.

13. **Act of Insured's Son.** In an action on a policy for fire insurance, an allegation of the answer that the son of the plaintiff filled a stove in the building destroyed, with combustible materials, and thus recklessly caused the loss, stated no defense and was properly stricken out, there being no allegation that plaintiff ordered such act of his son or had notice of it. Malin v. Insurance Co., 625.

14. **Increase of Risk.** Where the insured discovered a joist which was against a flue, to be burning, extinguished the fire, sawed off the charred end of the joist and removed some loose boards which were in contact with the flue, he did not thereby increase the risk, so as to require notice to the insured of the change, or avoid the policy under a clause of the policy which made it void if the hazard should be increased. Ib.

15. **Books of Account.** The purpose of a stipulation in a policy on a stock of goods, requiring the insured to keep a set of books showing a complete record of all transactions, etc., is to furnish data by which to ascertain the amount of goods on hand at the time of the fire and estimate with reasonable correctness the amount of the loss; and when this is done, a literal compliance with such a provision is not necessary. Ib.

16. **Three-Fourths Clause.** It is competent for fire insurance companies to fix the measure of damages in case of loss by a three-fourths value clause. Ib.

17. **Same: Harmless Error.** But in an action on a policy, an instruction to the jury which ignores the three-fourths value clause, was harmless error, where the evidence showed the total amount of insurance was less than three-fourths of the value of the property destroyed. Ib.

INTEREST. See **Money Had and Received, 4.**

INTERPLEA. See **Mandamus, 3.**

1. **Parties.** An interplea is an independent action engrafted on the original attachment and it is in the nature of an action of replevin for possession of the goods attached, in which the interpleader occupies the position of plaintiff and he must establish that he was owner of the goods at the time of the attachment, or had such an interest as would entitle him to possession. Torreyson v. Turnbaugh, 439.

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2. **Evidence.** Statements of a defendant in an attachment suit are not admissible in evidence as against the interpleader. Ib.

INVENTORY. See **Insurance**, 10.

ISSUES. See **Banks and Banking**, 2; **Master and Servant**, 6.

JUDGMENTS. See **Bills and Notes**, 5; **Corporations**, 4; **Trial Practice**, 10; **Verdict**, 3.

1. **Nunc Pro Tunc Entry: Evidence.** A nunc pro tunc entry of judgment can not be made on oral testimony, but only on minutes or other written data appearing on the judge's or clerks docket, the court records, or files and papers in the cause. Sperling v. Stubblefield, 489.

2. **Same.** Where there was a verdict, a motion in arrest stating that the "defendant comes and moves the court to arrest the judgment herein," etc., and an order overruling the motion, they were sufficient evidence to support a finding that a judgment had been rendered, and authorized a nunc pro tunc entry. Ib.

JURISDICTION. See **Bankruptcy**, 1, 2; **Justices of the Peace**, 4.

**Construction of Statutes.** Where terms of a circuit court were held at two places in the county, at one of which they were abolished by an act of the legislature providing that all causes pending there should be transferred to the circuit court at the other place, that being the county seat, a case at that time pending in the court of appeals, on appeal from a judgment rendered at the place where the terms were abolished, was within the provision of the act and the court at the county seat had jurisdiction. Sperling v. Stubblefield, 489.

JURORS.

**Statute: Signing Verdict: Reading and Writing.** The mere signing a verdict by his mark is not alone sufficient to overcome the presumed qualification of a juror on the ground that he can not read and write the English language as required by the statute. Parman v. Kansas City, 691.

JUSTICES OF THE PEACE.

1. **Notice of Appeal: Appearance.** Where two cases, appealed from a justice of the peace, were, by agreement of the parties, tried as one suit, that agreement, whether oral or in writing, was an appearance by the appellee to both suits and a waiver of notice of appeal. Morgan v. Lumber Co., 239.

2. **Pleading: Amendments.** Where there is no statement of any cause of action against some of several defendants, sued before a justice of the peace, there was nothing by which to amend as to them in the circuit court. Nenno v. Railroad, 540.

3. **Same: Void Judgment: Appeals.** A judgment rendered before a justice of the peace was void as to those defendants against whom no cause of action is stated and there was nothing to appeal from. Ib.

4. **Same: Waiver: Jurisdiction.** And such defendants did not waive the want of jurisdiction in the circuit court to hear the

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case on appeal, by appearing to an amended complaint filed in that court and going to trial. Ib.

KNOWLEDGE. See **Bankruptcy**, 3; **Partnership**, 3; **Real Estate Broker**, 6.

LACHES. See **Municipal Corporations**, 24.

LANDLORD AND TENANT. See **Mortgages and Deeds of Trust**, 1, 2, 3.

1. **Purchaser's Action for Possession: Statement: Statute: Surplusage.** A statement before a justice of the peace is held to aver every fact required by section 4138, Revised Statutes 1899, and on the conceded facts plaintiff was entitled to recover possession; and the fact that the statement prayed for recovery was mere surplusage and could not defeat his recovery. Sullivan v. Lueck, 199.

2. **Same: Payment of Rent to Grantor: Notice.** The fact that after the transfer by the landlord to the purchaser the tenant paid rent to the landlord can not defeat the purchaser's right to recover possession when the tenant has been notified to pay rent to the purchaser. Ib.

LAW. See **Partnership**, 2.

LEGAL CONCLUSIONS. See **Pleading**, 9.

LETTERS. See **Banks and Banking**, 12, 13, 14; **Real Estate Broker**, 3.

LIABILITY. See **Bankruptcy**, 5; **Corporations**, 2, 3; **Fraudulent Conversion**, 1; **Negligence**, 1; **Partnership**, 2; **Principal and Agent**, 1; **Railroad Crossing**, 3.

LICENSE. See **Railroad Crossing**, 2, 4.

LOSS. See **Insurance**, 3, 5.

MALICE AND WANT OF PROBABLE CAUSE. See **Malicious Prosecution**, 1, 2.

MALICIOUS PROSECUTION.

1. **Malice and Want of Probable Cause.** In an action for damages for malicious prosecution, the plaintiff, in order to maintain his action, must allege and prove, on the part of the defendant, both that the prosecution complained of was malicious and that it was without probable cause, though malice may be inferred from facts which show want of probable cause. Jordan v. Railroad, 446.

2. **Same.** The evidence in this case is examined and shows conclusive proof of probable cause, that it was wholly without malice and the verdict wholly unsupported by the evidence. Ib.

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**MANDAMUS.**

1. **Action at Law: Abstract of Record.** A proceeding for a writ of mandamus, commanding a county treasurer to pay a warrant drawn by the county board of education on funds in his hands, is an action at law, and not an equitable action requiring the whole of the testimony to be presented in an abstract of the record for review of the appellate court. State ex rel. v. Nerry, 458.

2. Such an action will lie to compel a county treasurer to perform his ministerial duty, the payment of a warrant, drawn by proper authority, upon a fund in his custody which is legally applicable to its payment. Ib.

3. **Not an Equitable Action: Interplea.** And such proceeding can not be converted into an equitable action by the return of the officer to such a proceeding, showing that strangers claim the fund upon which the warrant is drawn; nor can the court order such strangers to appear and interplead for it. Ib.

**MASTER AND SERVANT.** See **Railroad Crossings**, 3.

1. **Vice Principal Performing Labor: Negligence.** The fact that the vice principal while doing the work of a laborer does the same negligently and thereby injures a servant, does not make him a fellow-servant of the injured party and on that ground save the master from liability. Strode v. Conkey, 12.

2. **Same: Evidence: Res Gestae.** A vice principal at the top of a shaft, undertaking to throw a block into a car, missed the same and it fell down the shaft. *Held*, his contemporaneous exclamation to the servant working at the bottom that if he wanted to work there he would have to learn to dodge, is admissible in evidence. Ib.

3. **Instructions: Evidence.** The instructions are reviewed and held not to require a reversal, and the omission of the word "evidence" from an instruction is not a fault. Ib.

4. **Negligence: Usual Course: Evidence.** No inference of negligence can arise from evidence that shows that the instrument used was such as is ordinarily used for like purposes by persons in the same business; but this rule can not apply to the evidence in this case since the hammer complained of is not shown to be in general use by miners in the same business, but rather that such defective hammer though frequently used, constituted an exception to the general custom. Robbins v. Big Circle Min. Co., 78.

5. **Same: Assumption of Risk: Safe Appliances.** While the servant assumes the ordinary risk incident to the business the master is still bound to furnish the servant with reasonably safe instrumentalities to do his work; and the servant is not obliged to refuse to use the appliances if he reasonably believes he can safely use them by the exercise of proper care, and if he does use them, exercising such care, he does not waive his right to compensation for injury. Ib.

6. **Same: Safe Appliances: Issue.** On the trial of the question of negligence in furnishing a certain hammer to be used in breaking rock and mineral the question is not what would be a safe

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hammer nor whether the hammer was unsafe because of long use, but whether from long use it had become unfit to be longer used with the exercise of reasonable care and caution; and the defendant is held to have known the condition of the hammer and the question for the jury was whether, upon the evidence, it was reasonably safe to be used with the exercise of due care. Ib.

7. **Negligence: Sending Servant Amid Live Wires.** On review of the evidence it is held sufficient to send to the jury the question whether the defendant was negligent in sending its servant up a telephone pole amid live wires with the assurance that they were insulated when in fact they were not. Haworth v. Mineral Belt Tel. Co., 161.

8. **Same: Master's Assurance.** Though the servant knew there were live wires, the statement of his foreman that everything was safe and the order to go up to the pole were assurances that the wires were in the proper condition. Ib.

9. **Minors: Dangerous Employment.** Where plaintiff's evidence showed that he hired his son, a minor, to work for the defendant, and expressly forbade his being employed in a branch of the service which was hazardous, the defendant was liable for the death of the boy while engaged in that employment unless it could be shown that his death was the result of his own willful act; negligence on his part would not excuse the willful misconduct of the defendant in placing him in a place of danger against the express directions of his father. Coleman v. Land & Lumber Co., 254.

10. **Same: Emancipation.** It was error to exclude testimony on the part of the defendant, tending to show that the father had emancipated the boy prior to the time he was hired to the defendant. Ib.

11. **Safe Appliances: Proof of Negligence.** In an action by an employee against his employer for injuries which have resulted from the plaintiff's being put in an unsafe place to work, or being provided with unsafe tools, unless the accident carries on its face proof of negligence on the part of the employer, proof of the facts constituting his negligence must be produced in order to make him responsible for the injury. Kelley v. Railroad, 365.

12. **Same: Notice.** It is an essential element of negligence on the part of the employer in such a case that he had knowledge of the defect complained of, or such an opportunity to know as to be the equivalent of knowledge. Ib.

13. **Same: Duty of Servant.** It is the duty of a servant who has been put in charge of defective appliances, with notice that they are defective, to give proper notice to his employer, of the defect, and make a request for proper appliances, and if, after sufficient opportunity he fails to give such notice and make such request, he can not recover for injuries caused by such defective appliances. Ib.

14. **Assumption of Risk.** An employee assumes the risk naturally incident to his occupation, including the risk of injury from defective machinery, after the master has used ordinary care and reasonable diligence to furnish safe machinery and to keep it safe, and especially the risk incident to his (the servant's) own neglect. Ib.

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15. **Personal Injury: Evidence.** The evidence on the record was sufficient to send the case to the jury. Weston v. Mining Co., 702.

16. **Contributory Negligence: Evidence: Instructions.** On the evidence it is held that certain instructions relating to the contributory negligence of the plaintiff in continuing to work are held sufficient though inartificially drawn. Ib.

17. **Mines and Mining: Props: Instructions.** The widow of a miner killed by a falling roof does not have to show that timbers were necessary to support the roof and had been requested by her husband before the accident and an instruction to that effect is properly refused. Ib.

MEASURE OF DAMAGES. See **Municipal Corporations**, 10, 11.

MERCHANTS. See **Dramshops**, 1.

MESSAGE. See **Telegraph Companies**, 1, 2, 3.

MIDDLEMAN. See **Principal and Agent**, 17.

MINES AND MINING. See **Master and Servant**, 17.

MINORS. See **Master and Servant**, 9, 10.

**Degree of Care Required.** A minor is bound to use that care which persons of his age, capacity and intelligence are capable of using in like circumstances, and a youth of eighteen years of age, of ordinary intelligence and experience, should show some incapacity besides his minority to warrant the court in instructing the jury that he was not required to use the same care as an adult. Coleman v. Land & Lumber Co., 254.

MISAPPROPRIATION BY CASHIER. See **Banks and Banking**, 9, 10, 11.

MISJOINDER. See **Trial Practice**, 10.

MONEY HAD AND RECEIVED.

1. **Action for.** A petition is held to state an action for money had and received; such action lies when one receives money for the use of another and neglects to turn it over upon demand; and it is immaterial how the money came into the defendant's hands. York v. Farmers' Bank, 127.

2. **Pleading: Instructions: Conversion.** The instructions set out in the opinion are held to submit the cause on the theory presented in plaintiff's petition and not as an action for conversion; and the mere fact that the jury were required to find the market value of certain mules was an unnecessary imposition on the plaintiff and defendant can not complain thereof. Ib.

3. **Reasonable Value: Proceeds of Sale.** Where an action is brought against a bank to recover the amount of certain checks taken by plaintiff for mules sold a stock dealer who has deposited the proceeds of two car loads with the bank, which proceeds equal or exceed the purchase price of all the stock, the plaintiff does not have to prove the reasonable value of his mules but is entitled to recover the purchase price. Ib.



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4. **Interest: Instructions.** The plaintiff suing for money had and received is entitled to recover interest from the date of his demand; and section 2869, Revised Statutes 1899 applies to actions *ex delicto*. Ib.

5. **Evidence: Reversal.** *Held*, there was sufficient evidence to send the case to the jury and the admission of irrelevant testimony was not of such material character as to justify a reversal since it could not have influenced the jury. Ib.

MORTGAGES. See **Ejectment.**

MORTGAGES AND DEEDS OF TRUST.

1. **Landlord and Tenant: Foreclosure.** Under section 4355, Revised Statutes of 1899, a tenant who has a growing crop on premises, sold under a power contained in a mortgage or deed of trust, is not affected as to his interests in such crop. Nichols v. Lappin, 401.

2. **Same.** But it is doubtful if such protection is afforded to a tenant against a purchaser who acquires title at a foreclosure by a judicial decree. Ib.

3. **Same.** Where premises were sold under the power in a deed of trust and afterwards, at the suit of the mortgagor, the sale was set aside and a time fixed for redemption by the mortgagor, but the mortgagor failed to redeem and the premises were again sold by the sheriff under the decree, the purchaser at such sale acquired title to the crop growing on the premises at the time, as against a tenant, who leased the premises after the first foreclosure sale. Ib.

MOTION. See **Appellate Practice,** 2, 10, 11; **Information,** 1; **Pleadings,** 6.

MUNICIPAL CORPORATIONS.

1. **Paving Ordinance: Time of Publication: Sunday: Statutory Construction.** The statute that no person shall be served with any writ or process on Sunday, has no application to the notice required to be published by section 5661, Revised Statutes 1899, before a city of the second class can pass an ordinance requiring the reconstruction and paving of a street; and publication for five days before such action of the council is sufficient though the last day was Sunday. Barber Asphalt Pav. Co. v. Muchenberger, 47.

2. **Same: Finding of Council.** The finding and declaration of the common council that a publication for a special ordinance had been made for five days before their action on such ordinance is conclusive for all purposes. Ib.

3. **Same: Repairs: Instructions: Court's Finding.** In a suit on a taxbill for the improvement of a certain street, the court gave an instruction that if the work done under the contract was repairs then the finding should be for the defendants, and then found the facts against the defendants on evidence tending to support such finding. *Held*, judgment must stand. Ib.

4. **Negligence: Safe Street.** A municipality is liable for negligence in not keeping its streets in a reasonably fit condition for use by the public. Campbell v. City of Stanberry, 56.

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5. **Same: Evidence.** The evidence is held sufficient to send the case to the jury and insufficient to authorize a peremptory instruction on the ground of contributory negligence. Holding v. St. Joseph, 92 Mo. App. 143, distinguished. Ib.

6. **Same: Instructions.** The alleged negligence was a failure to guard and light an excavation in the street. The evidence showed neither precaution, and the instruction used the copulative "and" in the place of the disjunctive "or." *Held*, not prejudicial error, as the court on the evidence could well assume that the excavation was neither guarded nor lighted, and the jury could not be misled. Ib.

7. **Same.** Under the pleadings had it been shown that the excavation was protected by some other means than a guard or light, it would have constituted a defense, but there was no such evidence and the instruction properly confined the attention of the jury to the negligence specified in the petition. Ib.

8. **Same.** A city is not bound to keep its streets absolutely safe, but an instruction using the word "safe" without qualification is held not prejudicial in this case, when taken in connection with other instructions. Ib.

9. **Same.** The fact that a party may have learned that there was an excavation in the street will not defeat his recovery for an injury received because thereof, but only requires that he exercise ordinary prudence. Ib.

10. **Same: Measure of Damages: Instructions.** An instruction authorizing a recovery for medicine and medical attention is fully warranted on the facts in this record. Ib.

11. **Same: Accident: Instruction.** An instruction that if plaintiff received his injury by reason of an accident on his part he could not recover, is properly refused, since it eliminated defendant's negligence and left the case to stand as if the injury had been self-inflicted; besides, the instruction was condemned on a former appeal. Ib.

12. **Same: Evidence: Admission of Plaintiff: Instruction.** An instruction that the jury might take into consideration all statements made by plaintiff and the law presumed all statements against interest to be true but those in his own favor the jury might believe or disbelieve according as it found the facts, is properly refused as the admissions are extrajudicial and can be received only with great caution. Ib.

13. **Defective Sidewalk: Pleadings: Aider by Verdict.** A petition for personal injury by reason of a defective sidewalk stated that the walk had been in a defective condition for a long time, but failed to state defendant's knowledge thereof, or its failure to exercise reasonable care to ascertain. There was no objection to the petition at the trial. *Held*, the petition was amendable and is sufficient after judgment. Doherty v. Kansas City, 173.

14. **Personal Injury: Defective Sidewalk: Scienter: Instruction.** The plaintiff's instruction failed to submit the question of the defendant's notice or of the existence of the defect for a sufficient length of time to affect the defendant with constructive notice and it was not cured by any other instruction, and the verdict being possibly excessive the error in the instruction is held fatal. Ib.

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15. **Defective Sidewalk: Pleading: Aider by Verdict.** A petition defective in not averring knowledge of the defect in a sidewalk in time to repair it before the injury is held to be cured by the verdict since the question of sufficient time to repair depends on the attending facts and circumstances and was for the jury. Gerber v. Kansas City, 191.

16. **Same: Instructions: Time to Repair.** Instructions set out in the petition are condemned because they fail to submit the question whether the defendant had knowledge of the alleged defect in time to repair same before the accident. Ib.

17. **Same: Guarding Defect.** Said instructions are likewise faulty in that they impose on the defendant the duty to keep the place guarded or lighted since such failure is not negligence *per se*, but is a question for the jury under the evidence. Ib.

18. **Same: Departure: Evidence.** Said instructions were likewise faulty in departing from the specified negligence of the petition and are unsupported by the evidence. Ib.

19. **Same: Prejudice.** In the absence of a satisfactory showing that error is harmless, it must be concluded that it is prejudicial. Ib.

20. **Order Incorporating Village: Collateral Attack.** An order made by a county court, incorporating a village, is a judgment having the force and effect of other judgments rendered by courts of competent jurisdiction, and is not open to collateral attack, unless it is void on its face. State ex rel. v. Huff, 354.

21. **Same: Description of Territory.** The term "Westerly," in the description of the territory which is embraced in a village incorporated by order of the county court, means due west, and does not render such order void for uncertainty in the description. Ib.

22. **Same.** A county court has no jurisdiction to make an order incorporating a village which is already incorporated. Ib.

23. **Quo Warranto: Parties.** The action of quo warranto will not lie to oust the officers of a *de facto* municipal corporation, upon the ground that such municipality is not legally incorporated, where the sole purpose of the proceeding is to test the validity of the incorporation; such a proceeding must be brought against the municipality. Ib.

24. **Same: Laches.** Where a *de facto* municipality has acquired property, contracted debts and assumed jurisdiction over streets for fifteen or twenty years, a court, on the grounds of public policy, will not entertain an action to annul its authority. Ib.

25. **Repeal of Law.** The act of 1895 (sec. 108, p. 90, laws 1895), relating to cities of the fourth class, while repealing the former law, did not have the effect to repeal the municipal charters obtained thereunder. Ib.

26. **Defective Sidewalk: Contributory Negligence: Scienter.** The traveler may use an open highway though it is known to be in a defective condition; but must do so with care, and his knowledge of the defect may be considered in passing upon his care. Jennings v. Kansas City, 677.

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NAME. See **Bills and Notes**, 7; **Druggist**, 2; **Indictment**, 1.

NEGLIGENCE. See **Administration**, 5; **Carriers of Passengers**, 7, 8, 9; **Master and Servant**, 1, 4, 5, 6. 7, 8; **Municipal Corporations**, 4, 5, 6, 7, 8, 9, 10, 11; **Passenger Carriers**, 1, 2, 3; **Railroads**, 1, 2, 3, 4, 5, 6; **Trial Practice**, 11.

1. **Principal and Agent: Principal's Liability.** A petition sounding in negligence alleged that the engineer, without orders, moved out onto the main track at an hour when he knew plaintiff was generally on said track, and ran at a high rate of speed without a headlight. *Held*, the allegation that he was without orders did not make the action the personal one of the engineer so as to relieve the defendant from liability for his negligence, since he was in his master's employ and the latter became responsible for his actions within the line of his employment, even though they were willfully and directly antagonistic to orders. Payne v. Railroad, 155.

2. **Engineer's Duty: Party Rightfully on Track.** Where a party is rightfully on the railroad track to the knowledge of the engineer, it becomes his duty to keep a vigilant look-out, and if by so doing he could have discovered such party in time to have avoided a collision, the railroad company is liable. Ib.

3. **Same: Headlight.** If the engineer use every care to avoid striking a party rightfully on the track after he is discovered, yet if the engineer's negligent omission to have a headlight burning was the cause of his failure to discover such party sooner, thereby rendering it impossible to avoid the collision, the company is liable. Ib.

NEWLY-DISCOVERED EVIDENCE. See **New Trial**, 3.

NEW MATTER. See **Pleading**, 3, 4.

NEW TRIAL. See **Appellate Practice**, 2, 10, 11; **Practice**, 8; **Telegraph Companies**, 3.

1. **Grounds Stated in Order: Appellate Practice.** The burden is on the respondent, in the appellate court, to show that a motion for new trial was properly sustained upon any ground other than that designated in the order of the trial court awarding it, from which the appeal was taken; and, in the absence of such showing, the appellate court will be confined to the consideration of the cause mentioned in the order. **(Reyburn, J.)** Connally v. Pehle, 407.

2. **Surprise.** A new trial should not be awarded on the ground of surprise, where the surprise claimed is due to the least want of diligence; and upon the record in this case the order of the trial court granting it should be set aside. **(Reyburn, J.)** Ib.

**Majority Opinion.**

3. **Newly-Discovered Evidence.** The majority of the court are of the opinion that the newly-discovered evidence, upon which the new trial was asked, showed the account upon which judgment was rendered had been paid by respondent, that he was not negligent, and that the trial court did not abuse its discretion in awarding the new trial which manifestly makes for justice. **(Per Curiam.)** Ib.

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NOTICE. See **Bankruptcy**, 4; **Banks and Banking**, 6, 9; **Bills and Notes**, 6; **Execution Sales; Fraudulent Conveyance**, 3, 4; **Justice of the Peace**, 1; **Landlord and Tenant**, 2; **Master and Servant**, 12; **Partnership**, 3; **Real Estate Broker**, 6; **Taxbills**, 4.

NUNC PRO TUNC ENTRY. See **Judgment**, 1, 2.

OBJECTION. See **Banks and Banking**, 4; **Information**, 2; **Pleading**, 10.

OFFER. See **Real Estate Broker**, 4.

OFFICER'S SALARY. See **Banks and Banking**, 3.

OPTION DEALING. See **Gambling**, 1; **Information**, 4, 5; **Sales**, 1.

**Information.** An information under section 2339, Revised Statutes 1899, which charges that defendants kept an office, store or place "wherein was conducted, and permitted, the pretended buying and selling of shares of stocks and bonds," etc., was fatally deficient in that it failed to allege who permitted the buying and selling or that defendants had knowledge of the unlawful acts. State v. Runzi, 319.

ORDER. See **Appellate Practice**, 3; **Municipal Corporations**, 20, 21, 22.

ORDINANCE. See **Railroads**, 1, 4; **Taxbills**, 4, 5.

PAROL EVIDENCE. See **Deeds**, 1, 2.

PARTIES. See **Amendments**, 1; **Common Carriers**, 7; **Interplea**, 1; **Practice**, 4, 5.

**Verdict Conclusive.** Where the testimony was conflicting as to whether the plaintiff was the sole party in interest, and the question was submitted to the jury by appropriate instruction, the verdict is conclusive. Falkinburg v. Daggs, 595.

PARTNERSHIP. See **Administration**, 2; **Bankruptcy**, 1, 2; **Corporations**, 2, 3, 4.

1. **Attachment: Individual Debt: Priority.** The prior attachment of an individual creditor of a partner levied on the partnership assets, will not prevail over the subsequent attachment of a partnership creditor. Dry Goods Co. v. Sappington & Renshaw, 655.

2. **Same: Lien of: Partnership Creditor.** The fact that a partner borrowed money to purchase his interest in a partnership will not make his creditor a partnership creditor and so give him a *quasi* lien on the partnership effects, so that such prior attachment will prevail over subsequent attachment of partnership creditor. Ib.

3. **Damages: Law: Equity: Individual Liability of Partner: Pleading.** A petition against a partnership is examined and held to be an action at law for damages and not a proceeding in equity, and it is further held that such action may be maintained against an individual partner after it is ascertained that the partnership itself is not liable and the other partner is dismissed from the cause, especially where the petition shows the liability of such retained partner. Tennent Shoe Co. v. Birdseye, 696.

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4. **Knowledge of Copartner: Notice: Trustee.** The fact that a trustee's partner may have knowledge of transactions not within the scope of the partnership, will not affect the trustee with notice on such matter. Ib.

PARTY RIGHTFULLY ON TRACK. See **Negligence**, 2, 3.

PASSAGE OF ORDINANCE. See **Taxbills**, 4.

PASSENGER CARRIERS.

1. **Negligence: Demurrer to the Evidence.** A carrier is responsible for all injury to its passengers from even slight negligence; and on a review of the evidence, it is held the circumstances of the case raised the question as to the credibility of defendant's witnesses, whose evidence tends to explain away the presumption of negligence raised by the injury to the passenger, and therefore a demurrer to the evidence was properly overruled. Conflicting authorities noted. Holland v. Railroad, 117.

2. **Same: Leaving Seat: Instruction.** A passenger has the right to leave his seat in a railroad car temporarily for any legitimate purpose provided he does not expose himself to danger thereby, and the instruction that if the passenger, after being furnished a seat, voluntarily left it and was standing when injured by being thrown down, he was guilty of contributory negligence, is properly refused. Ib.

3. **Same: Instruction.** An instruction set out in a petition relating to a discoverable defect in the machinery is held sufficiently broad to impose upon the defendant the burden to disprove any kind of negligence. Ib.

4. **Stopping and Starting Train: Evidence.** A railway passenger carrier must allow its passengers a reasonable time to leave the train after it stops and exercise the highest degree of care so as not to suddenly jerk and jar the alighting passengers by starting its train. Moorman v. Railroad, 711.

5. **Same.** The evidence is reviewed and held sufficient to send to the jury the question of defendant's negligence in jerking its train under the rule that where a vehicle is under the management of the carrier and the accident is such as under the ordinary course of things does not happen, then negligence may be inferred in the absence of an explanation. Ib.

PAVING. See **Municipal Corporations**, 1, 2, 3; **Taxbills**, 2.

PAYMENT OF RENT. See **Landlord and Tenant**, 2.

PENALTY. See **Railroads**, 7, 8, 9, 10, 11.

PEREMPTORY INSTRUCTION. See **Practice**, 9; **Trial Practice**, 4.

PERSONAL INJURY. See **Master and Servant**, 15; **Municipal Corporations**, 14.

PERSONAL PROPERTY. See **Administration**, 3.

PLAINTIFF'S ASSUMPTION. See **Railroads**, 6.

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PLEADING. See **Banks and Banking, 2; Bills and Notes, 3, 4, 5; Corporations, 4; Justice of the Peace, 2, 3, 4; Money had and Received, 2; Municipal Corporations, 1, 3, 15; Partnership, 2; Practice, 5; Sales, 3; Trial Practice, 5, 9, 10.**

1. **Changing Cause of Action.** In an action for damages for the death of plaintiff's son, caused by the alleged negligence of the defendant, an amended petition based upon the same death. which attributed such death to facts, as constituting the defendant's negligence, different from the facts alleged in the first petition, did not change the cause of action. Coleman v. Land & Lumber Co., 254.

2. **Replication: Evidence.** Evidence is properly admitted to prove averments of new matter in a replication, which go to contradict the allegations of the answer, although the petition contains no averments on the subject. Rhodes v. Land & Lumber Co., 279.

3. **Replication: New Matter.** Under section 607, Revised Statutes of 1899, new matter may be set up in a reply, if not inconsistent with the petition, which constitutes a defense to a counterclaim set up by the defendant in answer. Ib.

4. **Same.** But the reply can not be used in aid of the petition to engraft thereon a material allegation which has been omitted. and it is error to instruct the jury authorizing a recovery by plaintiff on the proof of such allegation. Ib.

5. **Departure: Waiver.** Objection to an amended petition on the ground that it states a new cause of action is waived by pleading to it and going to trial. Phillips v. Barnes, 421.

6. **Same: Motion to Strike Out.** The proper way to make objection to it is by motion to strike out, not by objection to evidence in support of it. Ib.

7. **Same: New Cause of Action in Replication: Waiver.** The petition stated a cause of action for the price of timber sold upon an oral contract; the answer denied the contract sued on, setting up a subsequent written contract of sale and alleging payment of the contract price; the replication admitted all the averments of the answer except that of payment, which averment was denied; the defendant made no objection in the trial court, that the reply departed from the petition, and there was a verdict for plaintiff. *Held*, defendant could not be heard to assign for error that the plaintiff's judgment is not supported by his petition. Ib.

8. **Contract: Ambiguity: Jury Question.** The written contract set up in the answer recited that plaintiff had "given this my lease to said lands for the term of seven years" and then proceeded as follows: "I have received in full consideration for the above lease the sum of $325," and the replication admitted every fact set up in the answer except that the timber had been paid for, which it expressly denied. *Held*, the replication did not admit payment, and, under the most favorable construction of the instrument for the defendant, its terms were so ambiguous that the question whether the $325 was received as payment for the lease alone, or for the timber as well as the lease, was properly submitted to the jury. Ib.

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9. **Legal Conclusion: Informal Statement Good After Verdict.** A statement of a cause of action which pleads legal conclusions instead of stating the facts from which the right of action emanates, is informal and defective, but must be held sufficient to sustain a verdict. Young v. Prentice, 563.

10. **Informal Petition: Demurrer: Objections to Evidence.** Where a petition wholly fails to state a cause of action by omission of some essential averment which can not be implied from the language, advantage of the failure may be taken by objection to the introduction of evidence. Robinson v. Life Ins. Co., 567.

11. **Good After Verdict.** But where the facts requisite to constitute a cause of action are to be inferred from the petition, though it be defective in some of its averments, it will be upheld after verdict and advantage of the defect can not be taken by objection to the introduction of evidence. Ib.

12. **Tacit Admission of Answer: Defective Petition Cured by.** In an action for the purchase price of chattels, which the petition alleged were sold under a contract, consisting of a letter from plaintiff quoting the price and conditions of sale, and a letter of defendant accepting the offer but stating terms of payment, where the answer, after a general denial, seeks to avoid the obligation by alleging failure on plaintiff's part to perform the conditions of the contract, on its part, such allegation of the answer was a tacit admission that the offer of sale was accepted unconditionally and the contract fully agreed upon, and removed the necessity of an allegation in the petition to that effect. Fairbanks, Morse & Co. v. Mining & Mfg. Co., 644.

13. **Warranty: Aiding Defective Allegation.** The failure of the petition to allege that the chattels delivered were of the quality warranted in the contract, was aided by an allegation that defendant received and accepted them, the latter allegation carried with it the implication that the goods were of the kind warranted. Ib.

PLEADING AND PROOF. See **Practice,** 1, 2.

PLEA IN ABATEMENT. See **Practice,** 6.

POSSESSION. See **Fraudulent Conveyances,** 2, 3, 4; **Municipal Corporations,** 2, 3; **Waste.**

POWER OF PRESIDENT. See **Insurance,** 5, 7.

PRACTICE.

1. **Pleading and Proof.** A plaintiff can not allege one cause of action and recover upon the proof of another not stated, and when the plaintiff alleges specific acts of negligence, the evidence and the right of recovery will be confined to the specific acts charged. Aston v. St. Louis Transit Co., 226.

2. **Same: Self-Invited Error.** A party can not be heard to complain that the issues in the case on trial were widened beyond the range of the pleadings, where he has himself invited such a result by instructions asked on his own behalf. Ib.

3. **Carriers of Passengers: Burden of Proof.** Where a passenger, standing on the rear platform of a crowded street railway car,

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was thrown to the ground and injured by reason of the platform gate giving way, in a suit for injuries caused thereby, he made out a prima facie case by showing the happening of the accident; the burden was then upon the defendant to show facts which exonerated it from responsibility. Ib.

4. **Parties: Real Party in Interest.** The assignee of a judgment, under code practice, should sue in his own name, as the real party in interest, in an action on the appeal bond, and not in the name of his assignor to his use. Van Stewart v. Miles, 242.

5. **Pleading: Defect of Parties: Waiver.** A defect of parties apparent on the face of the petition must be raised by demurrer. The objection that the suit is brought in the name of one not the real party in interest, is waived by answer to the merits and going to trial. Ib.

6. **Plea in Abatement: Waiver.** A defendant does not waive his right to pleau in abatement of the action by pleading in bar and proceeding to trial upon the merits, but may unite in the same answer matter in abatement with matter in bar. Kitchens v. Teasdale Com. Co., 463.

7. **Instruction.** It is not error to refuse an instruction which correctly declares the law, where another instruction, practically the same, has been given. Brewer v. St. Louis Transit Co., 503.

8. **New Trial.** The granting of a new trial on the ground that the verdict is against the weight of evidence, is within the discretion of the trial court, and a ruling to that effect will not be disturbed in the absence of evidence that such discretion has been abused. Hill v. W. U. Telegraph Co., 572.

9. **Peremptory Instruction.** Where issues of fact were raised by the pleadings and the evidence offered by the plaintiff was oral, it was for the jury to weigh it, and a peremptory instruction to find for plaintiff was properly refused, although no evidence was offered by the defendant upon the issue. Whitson v. Bank, 605.

10. **Evidence: Application for Continuance.** In an action on a fire insurance policy, the defendant insurance company was granted two continuances, upon applications sworn to by the agent of defendant, on account of absent witnesses, whose alleged testimony was set out in the applications. The first application stated that two witnesses, named, saw plaintiff set fire to the property, the loss of which was the basis of the suit. The second application stated that two other witnesses were permitted by plaintiff to remove goods from the building on the night of the fire. The depositions of two witnesses, not named in either application, were read at the trial, who testified to the facts set up in the first application, but swore they did not know the witnesses named therein. No one testified to the facts stated in the second application. *Held*, that both applications were admissible when offered in evidence by plaintiff as circumstantial evidence tending to show want of good faith in the defense that plaintiff had caused the fire, and to affect the credibility of the two witnesses whose depositions were read. Malin v. Insurance Co., 625.

11. **Remarks of Counsel to Jury.** Under the circumstances of the case, which are examined, impassioned comment of counsel for plaintiff in his argument to the jury, upon the conduct of the defense, held not unwarranted nor prejudicial. Ib.

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PREFERENCE. See **Bankruptcy, 5.**

PREJUDICE. See **Municipal Corporations, 19.**

PRESENTATION. See **Bills and Notes, 8, 9.**

PRIMA FACIE CASE. See **Common Carriers, 5.**

PRINCIPAL AND AGENT. See **Banks and Banking, 5, 6, 7, 8; Insurance, 2, 3, 4, 5, 6, 7; Negligence, 1; Real Estate Broker, 1, 2, 3, 4.**

1. **Fraud: Liability.** The principal need not authorize the agent to practice a fraud on a third party, yet if he authorizes his agent to transact business with a customer and in so doing the agent practices the fraud on the customer the principal is liable. Phipps v. Mallory Com. Co., 67.

2. **Same: Extent of Authority.** If the customer knows the agent's authority is in writing he should look to the writing to ascertain its extent; but where the principal represents to him that the agent has certain authority the customer is not bound by the writing. Ib.

3. **Authority of Agent: Question for Jury.** In an action of assumpsit for merchandise sold and delivered, where the question at issue is whether the one who ordered the goods on the defendant's credit, had authority to act as defendant's agent, or if not, whether the conduct of the defendant estopped him from denying the agency, or had ratified the acts of the alleged agent, the evidence is examined at length and held sufficient to justify a submission of the questions to the jury. Hackett v. Van Frank, 384.

4. **Incidental Powers.** If an agent have direct authority to bind his principal in a particular transaction, this direct authority will carry with it by implication of law such powers as are suitable and reasonably necessary to accomplish the intended purposes, though no incidental powers were mentioned between the principal and agent. Ib.

5. **Same: Ratification.** If a man, without right, assumes to act for another, the act will be attributed to, and affect the person represented if he acquiesces in and adopts it; and this, whether the actor was devoid of any authority, or went beyond any authority he had. Ib.

6. **Same: Estoppel.** A man may be bound by an unauthorized and unratified act of a pretended agent, when his conduct induced some one to trust such pretending agent's assumed authority in matters which would entail a loss on the trusting party, if the one represented were permitted to deny responsibility. Ib.

7. **Same: Circumstantial Evidence.** That an alleged principal knew what was done in his name by another, may be established by direct evidence, or by proof that it was done in a manner to warrant the inference that he knew of it. Ib.

8. **Same: Implied Powers.** Where an agent had the management of a beer business for his principal, such agency did not give him the right to purchase whiskey in quantities on the defendant's credit, since that was not an authority commonly incident to such a business. Ib.

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9. **Same: Estoppel.** Where an agent acts beyond his authority, the principal he assumes to represent will be bound when the person dealt with had the right, in view of all the facts known to him, to believe he was dealing with an actual agent about a matter within the scope of the latter's authority, did believe it and rely upon it Ib.

10. **Same: Declarations of Agent.** The declarations of an agent as to the scope of his authority are not admissible in evidence against the person for whom he assumes to act, in the absence of proof that such person knew of them. Ib.

11. **Same: Evidence: Instruction.** It was proper for one who sold merchandise, on the belief that an assumed agent of the supposed purchaser had authority to purchase, to testify that the goods were sold on the supposed principal's credit, but in such case the jury should have been instructed that the evidence should not be considered for the purpose of determining the issue of the agency, but only for the purpose of showing to whom the seller looked for payment. Ib.

12. **Same. Estoppel.** In an action for the price of a quantity of whiskey, sold and delivered by plaintiff on the defendant's credit, to one assuming to act as agent for the defendant, where the agent had the express authority to manage a beer business for the defendant, the fact that a license as a wholesale liquor dealer was issued to the defendant and posted up in the room where the beer business was conducted and where the whiskey so purchased was kept, is inadequate to estop the defendant from denying the assumed agent's authority. Ib.

13. **Same.** Neither is the fact that the tags on such whiskey barrels bore the defendant's name, sufficient to estop him from denying the agent's authority, where the plaintiff did not pretend that he was induced to sell the goods in controversy on account of defendant's opportunity to see his name on the tags. Ib.

14. **Same.** Evidence that the defendant received a telegram from plaintiff in the presence of plaintiff's agent, and, in reply to a statement of the agent that the telegram meant that defendant should pay the plaintiff some money, the defendant gave an affirmative answer, was sufficient to submit the question of estoppel to the jury as to goods sold after that date, but not as to goods sold before that date. Ib.

15. **Same: Ratification.** In order to prove the actual authority of an agent, or ratification of assumed authority, it is not necessary to show that the circumstances tending to establish such authority, or assumed authority, were relied on by the party asserting it; but such circumstances must show that it was the intention of the party to be charged to authorize, or abide by, what was done. Ib.

16. **Same.** In an action for the price of a quantity of whiskey purchased by an assumed agent of the defendant, where the agent's admitted authority was to conduct a beer business, the files of an action by the defendant to recover the price of the beer, sold by the alleged agent for him, were inadmissible in evidence. Ib.

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17. **Dual Agency: Public Policy: Middleman.** Where a double employment of an agent exists and is unknown to either party no recovery can be had against such party on a contract effected by such agent though there be neither designed duplicity nor fraud, but it is the consequence of an established public policy; and on the facts in this case there is no application of the rule relating to a mere middleman. Harper v. Fidler, 680.

18. **Definition: Instruction.** The term agent in an instruction need not be defined since it is readily understood by a jury of usual intelligence. Ib.

PRINCIPAL AND SURETY. See **Bills and Notes**, 5, 6, 7, 8.

PRIORITY. See **Partnership**, 1.

PROCEEDS OF SALE. See **Money Had and Received**, 3.

PROOF OF NEGLIGENCE. See **Master and Servant**, 11.

PROPS. See **Master and Servant**, 17.

PROTEST. See **Bills and Notes**, 10.

PUBLIC POLICY. See **Principal and Agent**, 17.

PUBLISHED RESOLUTION. See **Taxbills**, 3.

PUTS AND CALLS. See **Sales**, 1.

QUALIFIED PETITIONERS. See **Dramshops**, 1.

QUESTION FOR JURY. See **Pleadings**, 8; **Principal and Agent**, 3; **Street Railways**, 1.

QUOTATIONS. See **Information**, 4, 5.

QUO WARRANTO. See **Municipal Corporations**, 23, 24.

RAILROADS.

1. **Negligence: Ordinance: Speed.** Running a train through an incorporated city at a greater rate of speed than is prescribed by the ordinance regulating such matters, is such negligence as to render the defendant liable for personal injury caused thereby. Murrell v. Railroad, 88.

2. **Same: Trespasser: Licensee.** Where the defendant railroad had sign-boards warning people on its tracks and right of way of danger, but the warning had never been obeyed for a great number of years as was known to the defendant's employees. *Held*, plaintiff, who was injured while walking over its tracks was not a trespasser. Ib.

3. **Same: Avoiding Danger After Notice.** Though the plaintiff be guilty of negligence which ordinarily bars recovery, yet if the defendant's negligence in the speed of the train rendered it impossible to stop the same after plaintiff's negligence and danger is discovered, the company is guilty of negligence which created the impossibility and is liable for the resulting injury. Ib.

4. **Same: Speed: Ordinance: Licensee: Instructions.** Instructions are reviewed, approved and criticised. Ib.

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5. **Same: Persons on Track: Engineer's Duty: Speed.** The rule that an engineer may rightfully assume that persons seen on or along the track will get out of the way does not apply where the speed is unlawful and the engineer fails to reduce it within the legal limits after seeing a person on or near the track. Moore v. Railway, 176 Mo. 528, distinguished. Ib.

6. **Same: Contributory Negligence: Plaintiff's Assumption.** Though the plaintiff, a licensee on the railroad track, may have observed the approaching train, yet he has the right to assume the speed to be lawful and conduct himself accordingly. Ib.

7. **Stop at Intersection: Statutory Construction: Penalty.** A penal statute must be strictly construed so as not to enlarge the liability it imposes, nor allow recovery unless the party seeking such brings himself strictly within its terms. State ex rel. v. Railroad, 207.

8. **Same.** Section 1075, Revised Statutes 1899, requires railroad passenger carriers to stop their passenger trains at the intersection of other railroads a sufficient time to transfer passengers, baggage, etc., to the trains of the intersecting road; and its object was to afford facilities for persons traveling on one railroad and destined to points on an intersecting road. Id.

9. **Same.** To establish a case under said section the relator must prove that passengers, baggage, mail, and express freight for the intersecting road was at the junction on the day mentioned and that the respondent road did not stop its train a sufficient time to accomplish the transfer; and mere proof that the trains of respondent road passed without stopping is insufficient. Ib.

10. **Same.** The construction of a statute should accord with reason and the reason should prevail over the letter and general terms should be limited so as not to lead to injustice or oppression. Ib.

11. **Same: Evidence.** It is held that neither evidence introduced nor tnat refused was sufficient to make out a case under the statute. Ib.

RAILROAD COMPANIES.

1. **Switch Frogs.** A lumber company which had a license from a railroad company to operate log trains over a branch of the latter's road, and maintained a section boss and gang of section men to keep that part of the road in repair, is amenable to the provisions of section 1123 and 1125, Revised Statutes of 1899, and sub'ect to the penalty therein for failure to block switches, frogs, etc. Coleman v. Land & Lumber Co., 254.

2. **Same: Instruction.** In an action for damages on account of the death of plaintiff's son, alleged to have been caused by the son's having caught his foot in an unblocked frog, it was error to give an instruction to the jury based upon such facts and ignoring the question as to whether such frog was within the territory where the statute required the defendant company operating the road to block frogs, where the evidence is not clear as to the location of the frog. Ib.

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2. **Master and Servant: Limit of Liability.** Where the facts showed that the frog, where the son's foot was caught, if that was the cause of his death, was not on the side of the track where he was required to work in the pursuance of his duty, the defendant was not liable for the injury resulting unless intervening negligence was shown on the part of defendant that directly contributed to the injury. Ib.

RAILROAD CROSSING.

1. **Statutory Duty.** A traveler approaching a railroad crossing has a right to rely upon the railway company's performance of its statutory duty to sound the whistle or ring the bell, thus warning him of the approach of an engine. Elliott v. Railroad, 523.

2. **Duty of Traveler to Look and Listen.** And a traveler driving a wagon, when thus approaching a railroad track, where the view is obstructed, if he is in a position to hear the bell or whistle, is not required to exercise the extraordinary precaution of stopping, tying his team and going forward on foot to a point where he can see if a train is approaching. Ib.

3. **Same.** The evidence in this case examined at length and held that the plaintiff, who sues for damages caused at a crossing of a railroad track, by a collision with an engine, was not, as a matter of law, guilty of contributory negligence in not stopping before attempting to drive across and going forward on foot to see if a train or engine was approaching. Ib.

RATE OF SPEED.

**Expert Testimony not Necessary to Show.** The velocity of a car or a train in motion, propelled by electric or steam power, does not have to be established by the testimony of experts; any one accustomed to riding on cars and seeing them run is a competent witness as to their speed. Aston v. St. Louis Transit Co., 226.

RATIFICATION. See **Banks and Banking**, 7, 8; **Principal and Agent**, 5, 15; **Real Estate Broker**, 1.

1. **Commissions: Principal and Agent: Ratification.** Where a landowner on full knowledge adopts a sale made by a broker and conveys the land to the purchaser named in the contract, he is estopped to deny the broker's agency and his right to compensation, and such owner may claim benefits of a contract made by his agent with the broker. Hurt v. Jones, 106.

2. **Principal and Agent: Demurrer to Evidence: Instructions.** On a review of the evidence it is held to be sufficient to send to the jury the question of agency between broker and landowner, and that the instruction properly submitted the case. Veale v. Green, 182.

3. **Same: Evidence: Letters.** On an issue of agency certain letters are held admissible since they show the situation concerning the matters up to the final employment. Ib.

4. **Same: Offer: Acceptance: Evidence.** The evidence is held sufficient to warrant the finding of acceptance of an offer made by a landowner to a broker. Ib.

5. **Agency: Death of Principal.** Where the landowner dies the authority of the real estate broker to sell the land ceases. Kyle v. Gaff, 672.

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6. **Same: Knowledge of Principal: Agent's Notice.** The principal is only bound by such knowledge as an agent obtains in the scope of his employment; and where a real estate broker's action in attempting to sell the land became known to a special agent of the landowner notice can not be imputed to the latter. Ib.

7. **Same: Evidence: Ancestor's Heirs.** The mere fact that the broker of the ancestor after the death of the latter participated in the efforts to sell the land has no probative force to bind the heirs and render them liable to commission. Ib.

8. **Same: Ancestors: Heirs.** Knowledge of the general agent of an ancestor that a real estate broker was continuing his efforts to sell the land after the owner's death can not bind the heirs. Ib.

REAL PARTY IN INTEREST. See **Practice**, 4.

REASONABLE CERTAINTY. See **Damages**, 2.

RECEIVING STOLEN GOODS. See **Indictment**, 1.

RECORD PROPER. See **Appellate Practice**, 2, 11.

RECOVERY. See **Trial Practice**, 5.

REDEMPTION. See **Ejectment**, 1.

REFORMING CONTRACT. See **Equity**, 2, 3.

REMEDY. See **Forcible Entry and Detainer**, 1.

RENTS AND PROFITS. See **Ejectment**.

REPAIRS. See **Municipal Corporations**, 3.

REPEAL OF LAW. See **Municipal Corporations**, 25.

REPLICATION. See **Pleading**, 2, 3, 4, 7.

REPRESENTATIONS. See **Insurance**, 1.

RES ADJUDICATA.

In an action on an appeal bond given in a forcible entry and detainer suit, that part of the answer which set up in defense facts which might have been invoked as matters of defense to the forcible entry and detainer action, was properly stricken out on motion because already adjudicated. Van Stewart v. Miles, 242.

RESCISSION. See **Contract**, 6.

RES GESTAE. See **Master and Servant**, 2.

RESIDENCE. See **Homestead**, 1.

RESOLUTION. See **Taxbills**, 1.

RETURN OF PREMIUM PAID. See **Insurance**, 4, 7.

REVERSAL. See **Appellate Practice**, 1; **Money had and Received**, 5.

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SAFE APPLIANCES. See **Master and Servant**, 5, 6, 11, 12, 13.

SAFE STREET. See **Municipal Corporations**, 4, 5, 6, 7, 8, 9.

SALES. See **Homestead**, 2.

1. **Puts and Calls: Option Dealing: Gaming.** A "put" contract set out in the opinion is considered in connection with certain evidence and held to be an option without an actual intent to deliver the grain mentioned, and, therefore, was mere gambling on the difference between the market and the contract prices. Lane v. Logan Grain Co., 215.

2. **Delivery.** In an action on a contract for the purchase price of goods sold, when the place of delivery is named in the contract, plaintiff must allege and prove a delivery or tender of delivery at the place named in the contract, or a sufficient excuse for non-tender. Fairbanks, Morse & Co. v. Mining & Mfg. Co., 644.

3. **Same: Pleadings: Waiver.** Where the petition alleged delivery at one place and the contract set up required delivery at another place, but the answer alleged that "when plaintiff offered to deliver (the goods), the defendant refused to accept them at the time and in the manner offered because great loss would thereby ensue to" defendant, this allegation of the answer showed a waiver of delivery at the place provided in the contract. Ib.

4. **Measure of Damages.** The measure of damage in an action for goods sold and delivered on special contract, is the contract price with legal interest from the date payment is due. Ib.

SCIENTER. See **Banks and Banking**, 13, 14; **Municipal Corporations**, 14, 26.

SELF INVITED ERROR. See **Practice**, 2.

SELLING LIQUOR WITHOUT PRESCRIPTION. See **Druggist**, 1.

SEPARATE FINDINGS. See **Verdict**, 2.

SIGNAL TO STOP. See **Carriers of Passengers**, 5.

SPEED. See **Railroads**, 1, 4, 5.

STAKES LOST. See **Gambling**, 2.

STATEMENT. See **Landlord and Tenant**, 1; **Pleading**, 9.

STATUTE. See **Administration**, 2; **Appellate Practice**, 1; **Bills and Notes**, 10; **Costs**, 1; **Deeds**, 1; **Information**, 3, 4, 5; **Jurisdiction**, 1; **Jurors**, 1; **Landlord and Tenant**, 1; **Taxbills**, 3; **Trial Practice**, 1.



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STATUTES CITED AND CONSTRUED.

Revised Statutes 1899.

Section 46, see page 75.
61, see page 75.
417, see page 441.
444, see page 363.
463, see page 191.
540, see pages 246, 478.
541, see page 246.
542, see page 246.
566, see page 19.
598, see page 247.
607, see page 314.
629, see page 571.
672, see pages 565, 571, 701.
800, see page 418.
812, see page 433.
813, see page 167.
867, see page 234.
874, see page 167.
1075, see page 209.
1102, see page 529.
1123, see page 271.
1255, see page 573.
1293, see page 101.
1916, see page 277.
2221, see page 438.
2225, see page 438.
2337, see pages 217, 218, 438.
2338, see pages 218, 331, 438.
2339, see pages 218, 329, 438.
2340, see page 438.
2341, see pages 218, 438.
2342, see pages 218, 438.
2477, see page 325.
2510, see page 327.
2515, see page 327.
2865, see page 272.
2866, see page 272.
2869, see page 140.
2993, see pages 24, 26.
3051, see page 342.
3135, see page 612.
3424, see page 438.
3799, see page 693.
4130, see page 203.
4131, see page 203.
4136, see pages 201, 203.
4137, see pages 201, 203.
4138, see page 201.
4355, see page 403.
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4501, see page 10.
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5651, see page 53.
5661, see pages 50, 52.
5681, see page 55.
5988, see pages 86, 224.
5989, see pages 86, 224.
7969, see page 582.
7970, see page 582.
7973, see page 145.
7976, see page 145.
7979, see page 582.
8079, see page 145.
8542, see pages 25, 26.
8546, see page 26.
10115, see page 198.

Revised Statutes 1889.

Section 944, see page 548.
2013, see page 19.
2042, see page 20.
2133, see page 21.
2253, see page 167.
5209, see page 438.
5505, see page 19.
5548, see page 19.
5549, see page 19.

Revised Statutes 1879.

Section 370, see page 418.
Page 171, see page 548.

Laws of 1895.

Section 108, see page 365.

STATUTORY CONSTRUCTION. See Banks and Banking, 1; Municipal Corporations, 1; Railroads, 7, 8, 9, 10, 11.

STATUTORY DUTY. See Railroad Crossing, 1.

STENOGRAPHER'S NOTES. See Costs, 1, 2.

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STOCK OF GOODS. See **Fraudulent Conveyances**, 1.

STOLEN GOODS. See **Indictment**, 1.

STOP AT INTERSECTION. See **Railroads**, 7, 8, 9, 10, 11.

STOPPING AND STARTING TRAIN. See **Passenger Carriers**, 4, 5.

STREET RAILWAYS.

1. **Contributory Negligence: Question for Jury.** Where the plaintiff testified that she attempted to pass in front of a stationary street car, two feet distant, on a crowded street, and was injured by the sudden starting of the car, without warning, the question as to whether the plaintiff was guilty of contributory negligence, which proximately caused the injury for which she sued, was properly submitted to the jury. McLeland v. St. Louis Transit Co., 473.

2. **Concurring Negligence.** But if the injuries were the result of the mutual and concurring negligence of the plaintiff and defendant's motorman, and either without the other would not have caused the same, the plaintiff can not recover, and it was error to refuse to so instruct the jury. Ib.

3. **Departure: Instruction.** It was a departure from the issues presented by the pleading and the evidence to instruct the jury upon the theory that defendant was liable if the motorman could have stopped the car after he saw, or, by using ordinary care, could have seen her position of peril, the negligence assigned being the sudden starting of the motionless car, and there being no averment nor proof that the casualty resulted from failure to stop the car. Ib.

SUBCONTRACTORS. See **Contractor's Bond**, 1, 2.

SUBSTITUTED MATERIAL. See **Taxbills**, 2.

SUNDAY. See **Municipal Corporations**, 1, 2.

SURPLUS. See **Banks and Banking**, 1, 2; **Landlord and Tenant**, 1.

SURPRISE. See **New Trial**, 2.

SWITCH FROGS. See **Railroad Crossings**, 1, 2, 3.

TACIT ADMISSION OF ANSWER. See **Pleading**, 12.

TAXBILLS.

1. **Grading: Resolution.** If a published resolution for paving a street does not include a description of the work of bringing the street to grade and the cost of such work is included in the taxbills, the bills are thereby rendered void. Kansas City ex rel. v. Askew, 84.

2. **Paving Street: Contract: Substituted Material.** A contract called for crushed river gravel. The gravel used was not crushed. *Held*, the taxbills were void. Ib.

3. **Published Resolution: Grading: Statute.** A published resolution declaring the necessity of the paving of a certain street

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failed to describe the work of the necessary grading. The cost of the grading was taxed in the bills. *Held*, the bills were void since to create a lien on the citizen's property adherence to the statute must be had. Smith v. City of Westport, 221.

4. **Notice: Contractors: Passage of Ordinance.** A city council has power to advertise for bids and contract for paving a street before passing an ordinance ordering the work to be done if such steps were taken by proper resolution. Ib.

5. **Contract: Time: Ordinance.** Though a city may extend the time for paving a street when the contract provides for a forfeiture for each day after the specified time, when the ordinance requires that the work shall be done in a definite time, the city council can not extend the time since it is the essence of the contract. Ib.

TAXPAYERS. See **Dramshops, 1.**

TELEGRAPH COMPANIES.

1. **Message: Failure to Transmit.** In an action against a telegraph company, under section 1255, Revised Statutes 1899, for failure to transmit and deliver a message, the petition which charged that the defendant "carelessly and negligently failed to transmit" the message, was sufficient without alleging failure to deliver. Hill v. W. U. Telegraph Co., 572.

2. **Message: Duty to Transmit and Deliver.** In an action against a telegraph company, under section 1255, Revised Statutes 1899, for failure to transmit and deliver a message, the petition correctly stated the measure of defendant's duty in alleging that such duty was to transmit and deliver the message. Ib.

3. **Same: New Trial.** An order granting plaintiff a new trial in that case should stand because the evidence shows that the message was not transmitted within a reasonable time. Ib.

TENDER. See **Insurance, 6, 7.**

THREE-FOURTHS CAUSE. See **Insurance, 16, 17.**

TIME. See **Carriers of Passengers, 4; Homestead, 1; Municipal Corporations, 1, 2, 16; Taxbills, 5.**

TITLE. See **Administration, 3.**

TITLE AND RIGHT OF POSSESSION. See **Unlawful Detainer, 1.**

TRANSCRIPT. See **Appellate Practice, 4.**

TRESPASS. See **Animals; Railroads, 2.**

TRIAL PRACTICE.

1. **Injunctions: Statute.** The chapter of Revised Statutes 1899, relating to injunctions does not undertake to regulate the practice for hearing in such cases where there has been no temporary injunction, and the hearing must be governed by the general provisions of the code, and process may be served returnable to a future term, or the defendant may waive service and enter his appearance thereby giving the court jurisdiction of his person. Harding v. City of Carthage, 16.

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2. **Same: Filing Answer: Trial.** A petition for injunction was filed during the term of court. No temporary injunction was asked for. Process issued returnable to the next term. During the term the defendant appeared and answered. and asked the court to set the case for trial at that term, which was done. *Held*, the appearance and answer made such term the trial term, and the court could set the case down for hearing during said term. Ib.

3. **Uncontradicted Testimony: Duty of Court.** When there is but one witness and no question raised as to his credibility it becomes the duty of the court to declare the effect of his testimony as a matter of law. Gee v. Van Natta-Lynds Drug Co., 27.

4. **Peremptory Instruction: Trial Before the Court: Evidence.** In a trial before the court without a jury the defendant asked an instruction that the plaintiff is not entitled to recover. The plaintiff asked no declaration of law. *Held*, the giving of defendant's instruction did not withdraw from the court a consideration of any of the plaintiff's evidence, and the instruction amounted to a finding on the law and the evidence for defendant. Kansas City ex rel. v. Askew, 84.

5. **Pleading: Cause of Action: Recovery.** One can not sue on one cause of action and recover on another. York v. Farmers Bank, 127.

6. **Instructions.** Refusal to give an instruction which is included in other given instructions is no ground for complaint. Ib.

7. **Continuance: Court's Discretion.** The granting of a continuance is a matter resting in the sound discretion of the trial court, which has no right to arbitrarily refuse a continuance. Laun v. Ponath, 203.

8. **Same: Diligence.** In a proceeding to enjoin a foreclosure of a deed of trust securing certain notes, the answer represented that the notes were hypothecated with one H. Before the trial plaintiff notified the defendant to produce the notes at the trial. This, defendant reported at the trial he could not do, because H. who was present in court held them as collateral. Plaintiff asked a continuance because of defendant's failure. *Held*, plaintiff showed no diligence and there was no abuse of the court's discretion in refusing a continuance. Ib.

9. **Pleading: Inconsistent Defenses: Instruction.** If defenses are inconsistent the plaintiff should move to strike them out of the answer but failing in that he can not raise the question by an instruction. Harper v. Fidler, 680.

10. **Pleading: Misjoinder: Judgment.** A judgment can not be invalidated for a misjoinder of parties plaintiff. Tennent Shoe Co. v. Birdseye, 696.

11. **Demurrer to Evidence: Negligence.** If the defendant's evidence makes out a case of actionable negligence he is entitled to go to the jury notwithstanding the countervailing evidence of the defendant. Moorman v. Railroad, 711.

TRUSTEE. **See Partnership, 3.**

ULTRA VIRES. **See Corporations, 1.**

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UNAVAILABLE ASSET. See **Administration**, 4.

UNCONDITIONAL CONVEYANCE. See **Fraudulent Conveyance**, 1.

UNCONTRADICTED TESTIMONY. See **Trial Practice**, 3.

UNLAWFUL DETAINER.

**Title and Right of Possession Not in Issue.** In an action for forcible entry and detainer, neither the title nor right of possession is in issue, the only question being whether there has been a forcible entry on the plaintiff's possession. Van Stewart v. Miles, 242.

UNLIQUIDATED DAMAGES. See **Assignment of Claim**.

USUAL BUSINESS. See **Fraudulent Conveyance**, 2.

USUAL COURSE. See **Master and Servant**, 4.

USUAL PLACE. See **Carriers of Passengers**, 9.

VALIDITY. See **Contracts**, 4, 5.

VALUE. See **Evidence**, 1; **Insurance**, 8; **Money Had and Received**, 3.

VALUED POLICY. See **Insurance**, 9.

VERDICT. See **Appellate Practice**, 9; **Indictment**, 2, 3; **Jurors**, 1; **Parties**; **Pleading**, 11.

1. **Majority Verdict.** Under the amendment to the Constitution, adopted in 1900, a majority verdict may be rendered, but it must be concurred in by at least three-fourths of the jury; a less number can not render a legal verdict. Marshall v. Armstrong, 234.
2. **Counterclaim: Separate Findings.** On the trial of a cause where the defendant filed a counterclaim, a verdict which failed to have separate findings on plaintiff's cause of action and on defendant's counterclaim was incomplete. Ib.
3. **Proper Judgment on Informal Verdict.** A verdict which is improper in form is sufficient to sustain the judgment rendered thereon in accordance with the testimony. Kronck v. Reid, 430.

VERIFICATION. See **Information**, 1, 2.

VICE PRINCIPAL. See **Master and Servant**, 1, 2.

VOID JUDGMENT. See **Justice of the Peace**, 3.

WAIVER. See **Insurance**, 10; **Justice of the Peace**, 4; **Pleadings**, 5, 7; **Practice**, 5, 6; **Sales**, 3.

WARRANTY. See **Insurance**, 1; **Pleading**, 13.

WASTE.

**Injunction: Possession.** An injunction will not lie to prevent waste upon land, of which the record shows neither title nor possession in plaintiff. Perkins v. Mason, 315.

WEIGHING EVIDENCE. See **Appellate and Trial Practice**, 1.

WITNESSES.

**Evidence: Impeachment.** A deposition in a former suit is held competent to impeach a witness in a later suit involving the same matter. Tennent Shoe Co. v. Birdseye, 696.

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# Rules Governing Practice in the Kansas City Court of Appeals.

*It is ordered by the Court that the following Rules of Practice in the Kansas City Court of Appeals shall be in force and observed from and after the first day of April, 1885:*

RULE 1.—PRESIDING JUDGE. The Presiding Judge shall superintend all matters of order in the Court room and entertain and dispose of all oral motions.

RULE 2.—All motions in a cause shall be in writing, signed by the counsel and filed of record, and no motion shall be argued orally, unless the Court so directs.

RULE 3.—HEARING OF CAUSES. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits, showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—TAKING RECORDS FROM CLERK'S OFFICE. Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the library room of the Court, and to no other place, and then they must leave a written receipt therefor, but shall not be retained from the Clerk's office over night.

RULE 5.—DIMINUTION OF RECORDS. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

RULE 6.—CERTIORARI TO PERFECT RECORD. Whenever a writ of *certiorari* to perfect record is applied for, the motion shall state the defect in the transcript it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party or his attorney, previous to the making of the application.

RULE 7.—NOTICES OF WRITS OF ERROR. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.



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RULE 8.—REVIEW OF INSTRUCTIONS ON GENERAL STATEMENT OF EVIDENCE. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the Court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—BILL OF EXCEPTIONS WHEN GENERAL STATEMENT OF EVIDENCE IS ALLOWED BY TRIAL COURT. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the Court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed by him to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

RULE 10.—EVIDENCE—BILL OF EXCEPTIONS TO BE ALLOWED, WHEN. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the Court by which the cause is tried.

RULE 11.—EXCEPTIONS—QUESTIONS TO BE EMBODIED IN BILL. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—DUTY OF CIRCUIT COURT CLERKS IN MAKING TRANSCRIPTS. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause*), in making out transcripts of the record for this Court, set out the original or any subsequent writ, or the return thereof, but in lieu thereof shall say (*e. g.*): "*Summons issued on the* ——— *day of* ———, 188--, *executed on the* ——— *day of* ———, 188--;" and if any pleading be amended the Clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any



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abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no Clerk shall insert in the transcript any matter touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 13.—PRESUMPTION THAT BILL OF EXCEPTIONS CONTAINS ALL THE EVIDENCE. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in the cause, being that this Court may have before it the same matter which was decided by the court of first instance, it shall be presumed, as matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 14.—BILL OF EXCEPTIONS IN EQUITY CASES. In all cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

RULE 15.—ABSTRACT AND BRIEFS TO BE FILED AND SERVED. In all cases the appellant or plaintiff in error shall file with the Clerk of this court, on or before the day next preceding the day on which the cause is docketed for hearing, five copies of a printed abstract or abridgement of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this court for decision, together with a brief containing in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof.

The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for respondent, or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and the counsel for respondent, or defendant in error, shall, at least eight days before the day the cause is docketed for hearing, deliver to the counsel for appellant, or plaintiff in error, one copy of his brief, points and authorities cited, and such further abstract of the records as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the Clerk of this Court five copies of the same; and the counsel for appellant, or plaintiff in error, may, if he desires, within five days after the service on him of the respondent's, or defendant in error's, abstract and brief of aforesaid, file and serve a reply thereto in the manner aforesaid; and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the Clerk.

RULE 16.—CITING AUTHORITIES IN BRIEFS. In citing authorities in support of any proposition, it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases as well as the number of the volume and the page where



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the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, the section, the paging and sidepaging shall be set forth.

RULE 17.—APPELLANT'S BRIEF TO ALLEGE ERRORS COMPLAINED OF. The brief on behalf of appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct.

RULE 18.—PENALTY FOR FAILURE TO COMPLY WITH RULE 15. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15, the court, when the cause is called for hearing, will dismiss the appeal or writ of error, or, at the option of respondent or defendant in error, continue the cause, at the costs of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

RULE 19.—AGREED STATEMENT OF THE CAUSE OF ACTION. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon and the exceptions saved to any ruling, which may intelligently present to this Court the matters intended to be reviewed, and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 20.—MOTION FOR REHEARING. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of a cause, and must be founded on papers showing clearly that some question decisive of the cause, and duly presented by counsel in their brief, had been overlooked by the Court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the Court was not called. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite counsel; but no motion for a rehearing shall be filed after the final adjournment of the Court.

RULE 21.—MOTION FOR AFFIRMANCE. On motion for affirmance, under section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said law.



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RULE 22.—EXTENDING TIME FOR FILING STATEMENTS, ABSTRACTS, ETC. In no case will extension of time for filing statements, abstracts, and briefs be granted, except upon affidavit showing satisfactory cause.

RULE 23.—ORAL ARGUMENTS. When a cause is called for argument, the appellant, or plaintiff in error, will read the statement of the cause prepared by him; the defendant in error, or respondent, will thereupon read his statement, in each case without comment of any kind. The plaintiff in error, or appellant, will then proceed to argue for a reversal or modification of the judgment of the court below; the defendant in error, or respondent, will answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in this statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

RULE 24.—NOTICE ON MOTION TO DISMISS OR AFFIRM. A party in any cause filing a motion, either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall first notify the adverse party or his attorney of record, at least twenty-four hours before mak- the motion, by telegraph, by letter, or by written notice, and shall, on filing such motion, satisfy the Court that such notice has been given.

RULE 25.—WHEN APPEAL IS RETURNABLE—CERTIFICATE OF JUDGMENT—TRANSCRIPT. In all cases where appeals shall be taken or writs of error sued out to this court after September 1, 1903, the appellant shall file with the clerk of this court a full transcript or in lieu thereof a certificate of judgment as provided by section 813, Revised Statutes 1899, within the time by said section provided, and the date of the allowance of the appeal *and not the time of filing the bill of exceptions after the appeal is granted*, shall determine the term of this court to which such appeal is returnable; and when the appellant for any reason can not or does not file a complete transcript, he shall file, within the time allowed by said section of the statutes, a certificate of judgment, and may thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. And neither the fact that this court has heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for the return term shall be taken as an excuse, but in all such cases the appellant shall file a certificate of the judgment as and when required by said section 813, Revised Statutes 1899.

*Attest:*

*L. F. McCoy, Clerk.*



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# Rules of Practice in the St. Louis Court of Appeals.

*REVISED OCTOBER 17, 1888.*

*TO BE IN FORCE NOVEMBER 1, 1888.*

RULE 1.—PRESIDING JUDGE. The Presiding Judge shall superintend all matters of order in the Court room.

RULE 2.—MOTIONS. All motions in a cause shall be in writing signed by counsel and filed for record, and no motion shall be argued orally, unless the Court so directs.

RULE 3.—HEARING OF CAUSES. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—TAKING RECORDS FROM CLERK'S OFFICE. Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the law library, and to no other place, and then they must leave written receipt therefor, but shall return such record to the Clerk's office within five days after taking the same.

RULE 5.—DIMINUTION OF RECORD. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error except by consent of parties.

RULE 6.—CERTIORARI TO PERFECT RECORD. Whenever a writ of *certiorari* to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to the making of the application. The Court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript, when the transcript of the record is formally insufficient.



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RULE 7.—NOTICES OF WRITS OF ERROR. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—REVIEW OF INSTRUCTIONS ON GENERAL STATEMENT OF EVIDENCE. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—BILL OF EXCEPTIONS—WHEN GENERAL STATEMENT OF EVIDENCE IS ALLOWED BY TRIAL COURT. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

RULE 10.—BILL OF EXCEPTIONS—WHEN GENERAL STATEMENT OF EVIDENCE IS DISALLOWED BY TRIAL COURT. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue or fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given, and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the trial court.

RULE 11.—EXCEPTIONS TO ADMISSION OR EXCLUSION OF EVIDENCE. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—BILL OF EXCEPTIONS IN EQUITY CASES. In causes of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree on an abbreviated statement thereof.

RULE 13.—DUTY OF CLERK IN MAKING OUT TRANSCRIPTS. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the*



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*regularity of the process or its execution, or to the acquiring by the Court of jurisdiction in the cause*), in making out transcripts of the record for this Court, set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (*e. g.*): "*Summons issued on the* ——— *day of* ———, 188--, *executed on the* ——— *day of* ———, 188--;" and if any pleading be amended, the clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no clerk shall insert in the transcript any matter, touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 14.—PRESUMPTION THAT BILL OF EXCEPTIONS CONTAINS ALL THE EVIDENCE. The only purpose of a statement in a bill of exceptions that it sets out all the evidence in a cause being that this court may have before it the same matter which was decided by the court of first instance, it shall be presumed as a matter of fact in all bills of exceptions that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 14*a*.—ABSTRACTS IN LIEU OF TRANSCRIPTS WHEN FILED AND SERVED. In those cases where the appellant shall, under the provisions of section 2253, Revised Statutes of 1889, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing and shall in like time file four copies thereof with the Clerk of this Court. If the respondent is not satisfied with such abstract, he shall deliver to the appellant a complete or additional abstract at least fifteen days before the cause is set for hearing, and within like time file four copies thereof with the Clerk of this Court. Objections to such complete or additional abstract shall be filed with the Clerk of this Court within five days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the appellant in like time.

RULE 14*b*.—COSTS FOR PRINTING ABSTRACTS AND RECORD. Costs will not be allowed either party for any abstract filed in lieu of a full transcript under section 2253, Revised Statutes 1889, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. But in those cases brought to this court by a copy of the judgment, order or decree instead of a full transcript, and in which the appellant shall file in this court a printed copy of the entire record as and for an abstract, costs will be allowed for printing the same (unless the court, upon an inspection of the record, should become satisfied that the printing of the entire record was unnecessary for a full understanding of the points presented). The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reason-



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ableness thereof; and, if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge.

RULE 15.—BRIEFS, WHEN TO BE FILED. In all civil cases the appellant, or plaintiff in error, shall file with the Clerk of the Court, at least one day before the cause is called for trial, four copies of a brief, containing: *First.* A clear and concise statement of the pleadings and facts shown by the record. *Second.* An enumeration in numerical order of the points or legal propositions made or relied on, accompanied by the citation of authorities supporting each proposition. *Third.* If he so elects, an argument supporting each proposition made or relied on.

"The appellant, or plaintiff in error, shall also deliver a copy of said abstract, brief, points and authorities to the attorney for respondent, or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and the counsel for respondent, or defendant in error, shall, at least eight days before the day the cause is docketed for hearing, deliver to the counsel for appellant, or plaintiff in error, one copy of his brief, points and authorities cited, and such further abstract of the record as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the Clerk of this Court four copies of the same; and the counsel for appellant, or plaintiff in error, may, if he desires, within five days after the service on him of the respondent's, or defendant in error's, abstract and brief as aforesaid, prepare, file and serve, a reply thereto in the manner aforesaid; and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the Clerk."

RULE 16.—BRIEFS AFTER SUBMISSION. After a cause has been submitted, or has been taken as submitted, no leave to file briefs will be granted, except upon good cause shown. Counsel obtaining such leave will be required to serve a copy of his brief on counsel on the other side, who shall have five days' time after such service to reply to the same. Evidence of such service shall be furnished, as required by the preceding rule.

RULE 17.—CITING AUTHORITIES IN BRIEFS. In citing authorities in support of any proposition it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise the number of the edition, the volume, the chapter, the section, the paging and side paging shall be set forth.

RULE 18.—APPELLANT'S BRIEF TO ALLEGED ERROR COMPLAINED OF. The brief filed on behalf of appellant, or plaintiff in error, shall distinctly and separately allege the errors committed by the inferior court,



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and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct.

RULE 19.—PENALTY FOR FAILURE TO COMPLY WITH RULE 15. If any appellant, or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15 the Court, when the cause is called for hearing, will dismiss the appeal or writ of error, or at its discretion continue or reset the cause on proper terms. No oral argument will be heard from any counsel failing to comply with the provisions of rule 15.

RULE 20.—AGREED STATEMENT OF CAUSE OF ACTION. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which may intelligibly present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 21.—MOTIONS FOR REHEARING. Every motion for rehearing should be founded on suggestions of some party to the case, or of counsel, pointing out distinctly such grounds of error as are claimed to exist in the judgment of this court or in the opinion delivered. Such motion must be filed within ten days after delivery of the opinion of the court, and a copy of the motion, with any brief to be submitted in support thereof, shall be served upon the opposite party within the same period.

RULE 22.—MOTION FOR AFFIRMANCE. On motion for affirmance, under section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said laws.

RULE 23.—ORAL ARGUMENTS. When a cause is called for argument the appellant, or plaintiff in error, will read the statement of the cause prepared by him; the defendant in error, or respondent, will thereupon read his statement; in each case without comment of any kind. The plaintiff in error, or appellant, will then proceed to argue for reversal or modification of the judgment of the court below; the defendant in error, or respondent, will answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in the statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the



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commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

RULE 24.—NOTICE ON MOTION TO DISMISS OR AFFIRM. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party or his attorney of record, by telegram, by letter or by written notice of his proposed proceeding. When said adverse party or his attorney of record resides in the city of St. Louis, such notice shall be given at least twenty-four hours before the time appointed for the hearing of the motion; when the adverse party or his attorney of record resides outside the city of St. Louis, twenty-four hours' additional notice for each one hundred miles shall be given; and in all cases the court will require satisfactory proof that proper notice has been given.

RULE 25.—APPEARANCE OF COUNSEL. The counsel who represented the parties in the trial court, in any cause coming to this Court, will be held to represent the same parties, respectively, in this Court; but, should other counsel be engaged, they must enter their appearance in writing, the counsel for the appellant, or the plaintiff in error, ten days, and the counsel for the respondent, or the defendant in error, five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing of the counsel of the opposite party, to such appearance, be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

RULE 26.—In view of the rulings of the Supreme Court, confining the jurisdiction of this court in issuing original remedial writs to such cases wherein it has appellate jurisdiction, it is ordered: No original remedial writs, excepting such as are in aid of the appellate jurisdiction of this court and excepting also writs of habeas corpus and prohibition, will hereafter be issued by this court or any of the judges thereof, except in cases where the application of such writs can not be effectually presented to the Circuit Court or the Supreme Court, or some judge thereof. Nor will any writ of prohibition be issued in any case whereof the Supreme Court has appellate jurisdiction.

RULE 27.—Garnishees claiming any allowance in this Court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditure paid or incurred upon the appeal.



Ex. J. M. 1/21/05

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